In the Supreme Court of the United States

OCTOBER TERM, 1951

No.

OLIVER J. OLSON & CO., a Corporation,
Petitioner,

vs.

LUCKENBACH STEAMSHIP COMPANY, a Corporation,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petitioner Oliver J. Olson & Co., a corporation, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above entitled case on April 27, 1960.

OPINIONS BELOW

The opinion of the District Court is reported at 152 F. Supp. 197. The opinion of the Court of Appeals has not appeared in the Federal Reporter but is reported at 1960 A.M.C. 1230. Copies of the original opinion of the

District Court, of a *nunc pro tunc* order amending it, of the original opinion of the Court of Appeals, and of amendments to it made on denial of petition for rehearing, are attached as appendices.

JURISDICTION

The judgment of the Court of Appeals was entered April 27, 1960. A petition for rehearing was filed on May 27, 1960 and denied, with amendment of the opinion on June 8, 1960. The District Court had jurisdiction under 28 U.S.C. 1333, the Court of Appeals' under 28 U.S.C. 1292 and 1294, and the jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

In this admiralty collision case, the fault of one vessel is conceded. The only evidence of fault of the other is the testimony of an interested witness. While the trial court believed him, and found accordingly, the facts testified to by this witness are physically impossible. The finding is also inconsistent with all the other evidence of physical facts, which are described by the Court of Appeals as "unquestionably of great probative value". Nevertheless, the court declined to weigh the evidence believed by the District Court and affirmed solely on the ground that the District Court had labeled the evidence "credible" and on speculation that the other physical facts, although uncontradicted and undisputed, could have been different. The question then is:

1. Did the court below adopt an improper standard of review and disregard its duty to reverse a judgment clearly erroneous under the provisions of Rule 52(a) of the Federal Rules of Civil Procedure:

(a) in that the court below imposed upon appellant the burden of demonstrating by evidence to a certainty and beyond possibility of error, that the trial court's findings were erroneous;

(b) in that the court below declined to review the probative value of the evidence relied upon by the trial judge, and ignored the fact that the evidence was inherently impossible;

(c) in that the court below departed from the rule that where one vessel is admittedly at fault, the burden on the other to establish mutual fault is heavy, and imposed on libelant instead, the duty to establish its freedom from fault to a certainty.

STATUTES INVOLVED

Rule 52(a) Federal Rules of Federal Procedure; reading in pertinent part as follows:

> "In all actions tried upon the facts without a jury • • • the court shall find the facts specially • • •. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

33 U.S.C. § 146b(a) commonly known as Article 18 of the International Rules for Navigation at Sea, is also involved although its interpretation is not questioned. The pertinent parts are quoted in the District Court opinion appearing at Appendix pages 5-6.

STATEMENT

On May 14, 1956, on a clear night, respondent's ship, the *Marine Leopard*, proceeding at 17 knots, and without slowing, ran down and sank petitioner's ship, the *Howard Olson*, off the coast of California. The *Olson* was northbound and

the *Leopard* southbound. The lights of the two ships had been in each other's sight for approximately 30 minutes before the collision. In order to make the collision possible, the *Leopard* had to and did veer off her course to her right, in a series of unsignalled changes of course. In so doing, she admittedly violated the International Rules for Navigation at Sea (33 U.S.C. 147(a)). She rammed the right side of the *Olson* at a 90° angle and cut it in two. Since the *Leopard's* speed was more than twice that of the *Olson*, it is obvious that the *Olson* did not dart in front of the *Leopard* but that the *Leopard* turned and ran the *Olson* down. As a result of being cut in two, the *Olson* went to the bottom in a matter of minutes and four of her crew were lost.

Petitioner sued the *Leopard* and its owner, the respondent, in admiralty; respondent sued petitioner, and the suits were consolidated.[1]

The *Leopard* admittedly committed various violations of statutes governing safety at sea. The District Court found her at fault, and her fault was so egregious that respondent did not appeal or challenge the finding (Appendix 51-52).

Respondent claimed that the *Olson* was also at fault. It contended that the vessels approached each other "in such position as to see both sidelights of the other" ahead.[2] Were this so, Article 18 of the International Rules for Navigation at Sea (33 U.S.C. Sec. 146b(a)) would have required the *Olson* to alter her course to the right so as to

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1. A petition for limitation of liability under 46 U.S.C. Sec. 181 et seq. was also filed by petitioner, consolidated and tried with the other cases, and the decision therein was affirmed. It is not involved in this petition.

2. Under Article 2 of the International Rules for Navigation at Sea (33 U.S.C. Sec. 145), a green light must be carried on the starboard side and a red light on the port, each so screened as not to show across the bow. The lower courts correctly found that both vessels' lights were proper and brightly burning.

pass the *Leopard* on the left. Petitioner contended that the vessels approached one another each showing only a green light to the other, and therefore were required to pass each on the right side of the other.

Judge Oliver Hamlin, who decided the case in the District Court shortly before his elevation to the Court of Appeals, found that the ships were approaching so that each could see both sidelights of the other and that the *Olson* failed to obey Article 18. Thus they were held to be mutually at fault.

The District Court based its decision on the testimony of the master of the *Leopard* that he had seen both of the *Olson's* running lights. If this were all, it would be the end of the case, turning solely on credibility. But it is only the beginning.

The courses steered by the *Leopard* and her track through the water were established by her own automatic course recorder. The course steered by the *Olson* was found by the District Court, on uncontradicted evidence, to be 320° until shortly before the collision. As the opinion of the District Court states (Appendix 8):

> "The evidence was uncontradicted that the *Howard Olson* at 10:00 P.M., some four hours before the collision, was abeam of, and three miles off, the Cape San Martin light, which is about 40 miles south of Point Sur. She had a heading of 320° and continued on that course until her change to 310° shortly before the collision."

A chart showing the tracks of the two vessels, prepared from uncontradicted evidence, is attached.[3] This chart also

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3. Counsel for Luckenbach interpret the course recorder slightly differently, and thus draw the track of the *Leopard* slightly different, however on either interpretation the approach of the vessels is such that each shows only a green light to the other, and on both interpretations the testimony of the master of the *Leopard*, relied on by the trial court is a physical impossibility.

shows the track of a "bystander", the *SS John B. Waterman*, as established by its disinterested first officer and in fact admitted by all parties. (See opposite page.)

With the *Olson* on a course of 320° and the *Leopard* on the courses shown by its own recorder, it was a *physical impossibility* for the two ships to be approaching so as to show each to the other, both running lights. The chart so shows.

The testimony believed by the District Court was that of the *Leopard's* master who stated "that at 0210 when the vessels were approximately 3.3 miles apart, he saw both sidelights of the *Howard Olson* about 3° off the port bow." (Appendix 6).

At 0210 the *Leopard* was on a course of 151° and the *Olson* on a course of 320°. From these courses it is physically impossible for anyone on the bridge of the *Leopard* to see both the red and green light of the *Howard Olson* in the position testified to by Captain Snow. In addition, it is also true that if the *Olson* at 0210, were in the position indicated by Captain Snow and showing both red and green to the *Leopard*, and thereafter only red, as found by the trial court, a collision would have been physically impossible.[4]

With the track and speed of the Leopard *from 0210 to collision established by her course recorder and admitted by the* Leopard's *master it is a geometric truth that any course of the* Olson *from a position 3.3 miles away, 3° on the port bow of the* Leopard, *to the point of collision, would allow the* Olson *to show only a green light to the* Leopard.

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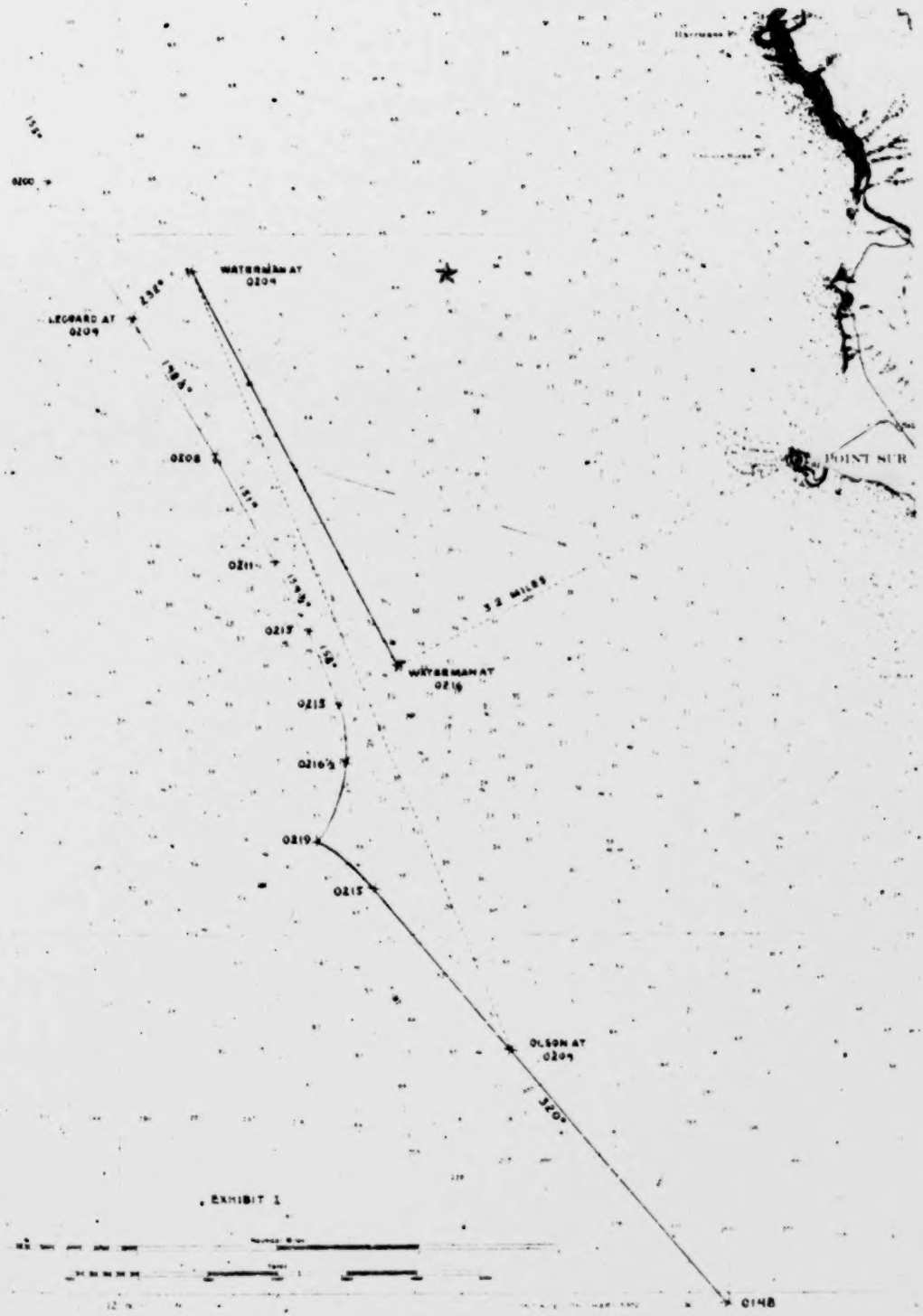
4. This fact is stated categorically, since nowhere in the course of this litigation have our opponents even attempted to demonstrate that it was possible. The detailed explanation of the impossibility is left to the briefs.


WATERMAN AT 0204
LEGGARD AT 0209
0208
0211
0213
WATERMAN AT 0216
0215
0216½
0219
0215
OLSON AT 0209
0148
POINT SUR
3.2 MILES
EXHIBIT 1

This statement is true on either Luckenbach's or Olson's interpretation of the course recorder, and is not dependent upon acceptance of the *Olson*'s 320° course, or any other fact other than the *Olson*'s maximum speed of 8 knots which has never been questioned.

In short, it was physically *impossible* for the testimony of the *Leopard*'s master to be correct. Conversely, if his testimony were correct, it would have been physically impossible for the collision to occur.

In the second place, there was a wealth of other uncontradicted physical evidence establishing that the two ships were not approaching end-on. For the purpose of this petition it is not necessary to detail it. In essence it is this: Shortly before the collision the *Leopard* overtook a third ship, the *John B. Waterman*, also southbound, and passed her about one-half mile to the west (seaward). The mate on watch on the *Waterman* (who testified by way of deposition) observed the approach between the *Leopard* and the *Olson* both on radar and visually, and located the positions of the three ships, each relative to the other. He stated the *Olson* was to the westward of the *Leopard*'s projected course and was proceeding to the westward. This was a simple, error-proof observation, by eye and radar. These facts were also established by the simple error-proof observation of the fact that the *Olson*'s range lights[3] were open to him, and that the bearing of the *Olson* continued to widen off his own bow.

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3. Vertically a ship's masthead navigational range lights are mounted so that the after light is a minimum of 15 feet above the forward light. Horizontally they must be a minimum of 45 feet apart. When these lights are viewed "beam on" they are widely separated. And, when viewed "head on" one appears to be over the other. Hence the terms, "Her lights are open", or "Her lights are closed". A trained navigator can tell at a glance the exact relative position of another ship.

With these facts, and with the *Leopard's* course as given by the *Leopard*, it was not physically possible for the *Olson* to show both red and green lights to the *Leopard*, and in fact it could only show its green light.

The Court of Appeals was so impressed with this independent evidence that it said that it did "unquestionably have great probative value" (Appendix 60).

In affirming, the court proceeded upon a wholly improper standard of review. It is this standard of review that our petition seeks to bring before this Court.

The Court of Appeals stated in its original opinion (Appendix 21) that, in order to reverse a judgment based on acceptance by the trial judge of a witness's credibility, the contrary evidence, although of "unquestionably * * * great probative value" must consist of "indisputable" facts (Appendix 37), of "facts beyond dispute" (Appendix 35), or "beyond question" (Appendix 35); in other words, that they must be such that it could not even be *conceived* that they might be different, or subject to the "possibility of error" (Appendix 36). The petition for rehearing was filed and the Court of Appeals in an amended opinion deleted certain references to "indisputable facts" or "facts beyond dispute" or "beyond question" and substituted therefor the words "without dispute" and the word "undisputed". (Appendix 43-44-45) But the significance is the same. Moreover, it thereby labeled evidence as "disputed" merely because it was not of absolute mathematical certainty.

REASONS FOR GRANTING THE WRIT

The decision of the court below applies an improper standard of review, departs from the accepted and usual course of judicial proceedings, is in conflict with *United States v. United States Gypsum Co.*, 333 U.S. 364 (1948), *The Victory and the Plymothian*, 168 U.S. 440, and other

decisions of this Court, and is in conflict with *Russo v. United States* (2 Cir.), 228 F.2d 317.

Prior to 1938, the standard of review of facts found by a trial court, sitting without a jury in an action at law, was the same as the standard of review of a jury verdict: a finding could not be set aside if there was evidence to support it; consequently, if there was support in testimony of a witness, the finding was impregnable since credibility was a question for the trier of fact.

But in equity cases "findings of fact were reviewable both as to the weight of supporting evidence and sufficiency: the review was both of fact and of law." 5 Moore's Federal Practice (2nd Ed.) p. 2607, Section 52.02. Consequently, support in testimony of a witness whom the trial court believed was not the end of the matter. If the appellate court was satisfied that the finding was erroneous and the decision unjust, it set them aside.

In admiralty there was a third rule: appellate review was a trial *de novo*.

By Rule 52(a) of the Federal Rules of Civil Procedure, this Court,

> "* * * feeling that the function of the appellate courts was to promote justice on the facts of each case as well as to establish general uniformity in law * * *" (5 Moore, p. 2609)

expanded the scope of review in jury waived actions at law by adopting the equity rule. Then, in line with Admiralty Rule 46½ requiring findings of fact, first lower courts (e.g. *Boston Insurance Company v. Dehydrating Process Co.*, 204 F.2d 441) and then this Court, *McAllister v. United States*, 348 U.S. 19, applied the same standard of review to admiralty cases.

Thus, under the proper standard of review, deference is to be given to the findings of the trial court and to its

view of credibility but the appellate court must nevertheless weigh the supporting evidence. An appellate court's function "to promote justice on the facts" is not discharged by exercises in dialectics to see how far a little testimony may go in order to affirm. The draftsman of Rule 52, Judge Clark, has stated[6]:

> "In this rule the design was to develop a formula which would suggest to the trial court the appropriate value to be placed upon the direct observation of a witness, but would not make that the controlling criterion of the rule itself."

Findings which are against the weight of evidence are not binding. In *United States v. United States Gypsum Co.*, 333 U.S. 364, this Court reversed a decision of a District Court although it was supported by the direct testimony of a large number of witnesses whom the trial judge believed. Appellate courts in admiralty must weigh the evidence to determine whether the trial court's findings are clearly contrary to the preponderance of the evidence. *Boston Insurance Co. v. Dehydrating Process Co.*, 204 F.2d 441, 444. Yet, as said in *Orvis v. Higgins*, 180 F.2d 537, 539 (2 Cir.), cert. den. 340 U.S. 810 (per Frank, J.), some courts have continued to err in resting too heavily on a trial judge's position to judge demeanor and credibility because they have not heeded what this Court said in the *Gypsum* case. As said by Judge Frank, "where a trial judge sits without a jury the rule varies with the character of the evidence," and

> "Where the evidence is partly oral and the balance is written[7] or deals with undisputed facts, then we

6. "Special Problems in Drafting and Interpreting Procedural Codes and Rules", 3 Vanderbilt L. Rev. 565.

7. Such as the deposition testimony of the independent witness in this case.

> may ignore the trial judge's finding and substitute our own (1) if the written evidence or some undisputed fact renders the credibility of the oral testimony extremely doubtful."
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> • • • • • • •
>
> "It follows that evidence sufficient to support a jury verdict or an administrative finding may not suffice to support a trial judge's finding. • • • For here the finding is that of a trial judge, and the evidence consists in large part of facts neither side disputes, in circumstances such that the trial judge's evaluation of credibility becomes unimportant."

We do not ask this Court to grant the writ in order to weigh the evidence itself. We ask it to do so in order to direct the court below to review the case in the light of the correct standard.

The court below applied a standard of review even more rigid than applicable to a jury action at law. Because the District Court said that it believed a witness, the court below in effect held itself estopped to weigh the evidence. It examined the evidence, not to ascertain where its overwhelming preponderance lay, but to see whether by surmise and speculation it was possible to raise some doubt about the compulsory character of petitioner's evidence; and concluding that petitioner's evidence was not beyond the "possibility of error", the court thereupon ignored it. Its approach to the case is summed up in these words of its original opinion (Appendix 37):

> "We do not undertake to say that any particular area of uncertainty discussed above necessarily deprives the Olson Company's independent evidence of high probative value. We do conclude that enough uncertainty is connected with these five items of evidence so that they may not fairly be labeled as indisputable."

After rehearing the court changed the last word to "undisputed."

The change quoted above highlights one of the errors in this case. Originally the Court of Appeals stated that "uncertainty" makes a fact "disputable". They have now changed the opinion to say that "uncertainty" makes a fact "disputed".

In the record there was no dispute or contradiction on the points where the court found "uncertainty".[8]

Therefore the opinion of the Court of Appeals as it will appear in the printed volume still has this revolutionary approach to appellate review under Rule 52(a) of the Federal Rules of Civil Procedure: The Court of Appeals opinion if allowed to stand can be cited for the proposition, that evidence which is not in fact "disputed" is at law "disputed" if it is not clothed with mathematical certainty.

In *Quock Ting v. U.S.*, 140 U.S. 417 at p. 421, the Court cited with approval the following language from *Kavanagh v. Wilson*, 70 N.Y. 177, at 179:

> "• • • 'It is undoubtedly a general rule that when a disinterested witness, who is in no way discredited, testifies to a fact within his own knowledge, which is not of itself improbable, or in conflict with other evidence, the witness is to be believed, and the fact is to be taken as legally established, so that it cannot be disregarded by court or jury • • •.'"

To say that mere lack of mathematical certainty creates a "dispute" is directly contrary to the general rule referred

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8. The only reference in the original opinion to a dispute as to any of these facts appeared on page 12 of the original opinion (App. 34) where the court stated "The briefs of Luckenbach and Cargo indicate that the computation is questioned." In the petition for rehearing Olson & Company requested the Court to indicate where, in any brief, the computation referred to was questioned. The Court in its amended opinion merely excluded the quoted words from its final opinion, thus admitting that there was in fact no such dispute. (Appendix 44)

to above. As a matter of fact the amended opinion still requires an essential fact to be proved "beyond dispute". (Appendix p. 62, New Opinion, 1960 AMC at page 1241) and refuses to accept as legally proved other essential facts because of "possibility of error". (Appendix page 64, New Opinion, 1960 AMC at 1243).

In short, the court's standard of review was this: oral testimony, however weak, (or even physically impossible) if believed by the trial court must control, unless the contrary evidence, however overwhelming, is scientifically or mathematically inescapable. In this case the testimony believed by the District Court did *in itself* represent a physical impossibility. In addition a series of physical facts, wholly uncontradicted, and independently established, make the testimony of the witness impossible. But the Court of Appeals ignored the impossibility of the believed testimony and as to the contrary facts speculated that they did not *necessarily* have to exist; i.e., that it *could* be conceived that they *might* be different. On this kind of speculation the court below has bound itself by the findings of the trial court.

This is an erroneous standard. In giving credit to testimony which represented a physical impossibility merely because the District Judge stated it was "credible" the Court of Appeals for the Ninth Circuit has come into direct conflict with the Court of Appeals for the Second Circuit. In *Russo v. U.S.*, 228 F.2d 317 (C.A. 2, 1955), Justices Hand, Frank and Medina were faced with an extremely similar problem of appellate review. In that case a witness had testified that an electric winch had started up, unexplainedly by itself with no one touching the controls. The District Judge believed this witness to be credible, and based his opinion upon this testimony.

The Court of Appeals noted that since the case was in admiralty the findings were "given to the same review as in

a case of findings by a judge in a suit in equity or in an action at law not tried to a jury."

In the proper exercise of its appellate function the Court of Appeals for the Second Circuit weighed the probabilities and determined that the truth of this testimony was highly improbable, and therefore despite the District Court's assertion that it believed the witness the Court of Appeals reversed.

In the case at bar the Court of Appeals refused to evaluate the allegedly supporting testimony, and instead accepted it merely because the District Court said it was "credible". This is in direct conflict with the decisions of this Court as to the correct application of Rule 52(a) and is in conflict with the Second Circuit's application of said rule.

As pointed out in 5 Moore's Federal Practice (2d Ed.) page 2607, Rule 52(a) requires that findings be reviewed "both as to the weight of the supporting evidence, and the sufficiency". In this case, the Court of Appeals did not review the *supporting* evidence *at all.*

Moreover, the District Court said that it believed *both* (a) the fact that the *Olson* was on a course of 320° and (b) that the Master of the *Leopard* testified truthfully that he saw both of the *Olson's* sidelights 3.3 miles away bearing 3° on his port bow. Yet, as seen, these are inconsistent. One of the instances in which a finding should be reversed under the standard of R. C. P. Rule 52(a) is where the District Court misapprehends the effect of evidence. *Sanders v. Leech* (5 Cir.), 158 F.2d 486, 487. The District Court did not appreciate that these two were inconsistent. In a situation such as this, an Appellate Court should remand the cause so that the District Court can appraise the facts again with realization of their inconsistency. Any other procedure is contrary to the duty to give deference to the trial court's belief in credibility.

The impropriety of the standard of review applied by the court below is even greater in a collision case in admiralty involving a claim of mutual fault.

As this Court has established, a vessel admittedly guilty of fault, such as the *Leopard* in this case, has a heavy burden of proving fault of the other vessel. The "evidence to establish fault on the part of the [other] must be clear and convincing in order to make a case of apportionment", *The Victory and the Plymothian*, 168 U.S. 410 (1897), following the doctrine of *The City of New York*, 147 U.S. 72, (1893), which stated at page 85

> "* * * Where fault on the part of one vessel is established by uncontradicted testimony, and such fault is, of itself, sufficient to account for the disaster, it is not enough for such vessel to raise a doubt with regard to the management of the other vessel. There is some presumption at least adverse to its claim, and any reasonable doubt with regard to the propriety of the conduct of such other vessel should be resolved in its favor. * * *"

The court below ignored this rule. The *Olson*, in its action against the *Leopard*, proved that the *Leopard* was guilty of statutory faults sufficient to cause the collision, and the *Leopard* did not appeal from the finding of its fault. A heavy burden was thus on the *Leopard* to prove fault of the *Olson*. Instead of reviewing this case to determine if the *Leopard* had carried this burden in the District Court, the Court of Appeals reversed the burden of proof and required that the *Olson* prove its freedom from fault by evidence "beyond dispute". This was erroneous, for it was the obligation of the *Leopard* to prove the fault of the *Olson* by evidence of "great probative value." It was not the obligation of the *Olson* to prove its freedom from fault by such evidence, even though the Court of Appeals found that it did so.

The Court of Appeals, in failing to apply the proper standard of review, imposed no burden of proof upon the *Leopard* to prove the fault of the *Olson*, but instead imposed upon the *Olson* a virtually impossible burden of proving that it was not at fault. This is error under ordinary rules governing burden of proof—but is greater error in view of the rule stated by this court in *The City of New York*, quoted above.

CONCLUSION

The opinion of the Court of Appeals, if allowed to stand will, as a precedent, render virtually useless the process of appellate review on questions of fact. This opinion, while alluding to the "clearly erroneous" doctrine, does in fact stand for the proposition that no finding of a lower court which is based on alleged "credibility" can be reversed unless there is proof to a "*certainty*", without "possibility of errors" that the finding was erroneous.

Such a case would be rare indeed, and the objects of justice sought in enactment of Rule 52(a) would be lost to all but a very few appellants.

At best, the opinion, if permitted to stand, will be a constant, confusing and misleading guide to the scope of appellate review. We therefore respectfully submit that this petition for writ of certiorari should be granted.

Dated: San Francisco, August 26, 1960.

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(Appendices Follow)

Appendix

[Title of District Court and Cause.]

Nos. 27332, 27376 and 27412 in Admiralty

OPINION

Hamlin, District Judge.

Approximately 2:19 a.m. on May 14, 1956, the freighter Marine Leopard collided with the lumber schooner Howard Olson in the Pacific Ocean, about three miles off the California Coast near Point Sur. A few minutes after the collision the Howard Olson sunk. The collision gave rise to a number of admiralty actions and three were consolidated for trial at this time for the purpose of determining fault. The consolidated actions consist of a libel filed by Oliver J. Olson & Co., the owners of the Howard Olson, against the Marine Leopard and her owners, Luckenbach Steamship Company, for damages occasioned by the total loss of the Howard Olson; Luckenbach's cross-libel against Olson & Co. for damages to the Marine Leopard; and, finally, a petition of Olson & Co. for exoneration from liability or in the alternative if liability be found, that it be limited to the value of Olson & Co.'s interest in Howard Olson after the collision (46 U.S.C.A. 183-189). Numerous personal injury and death claimants and cargo claimants filed claims in the limitation action, but only a few took active part in the present trial.

The Marine Leopard is a C-4 freighter, 622 feet 10 inches long with a beam of 71 feet 7 inches and 10,662.53 tons gross register. The Howard Olson was a 261-foot vessel of 2,477 gross tons, especially equipped for the lumber schooner trade. The Olson had left San Pedro, California, in ballast during the afternoon of May 12, 1956,

northbound for Coos Bay, Oregon. The Marine Leopard had departed San Francisco the next morning, May 13, and was bound down the coast to San Pedro.

Testimony most favorable to Olson & Co. shows that during the early hours of May 14 the Howard Olson was proceeding northward on a course of 320° true, three to five miles off the coast at a speed of approximately eight knots. The weather was clear and visibility was later estimated to be about 20 miles. Zinkiewicz, the Olson's second mate, had taken the watch at midnight. He had signed aboard the Olson for the first time on May 12, 1956, and this was only his third watch. About 1:30 a.m. the lookout, who was stationed on the wing of the bridge, reported a light on the starboard bow and it later turned out that this light originated from the southbound freighter, John B. Waterman. Approximately ten minutes later the lookout sighted another light which turned out to be from the southbound Marine Leopard, and reported it to the mate as being one point on the starboard bow.

The mate, Zinkiewicz, testified that the Marine Leopard was approximately twelve miles away when her white light was first called to his attention. When the distance between the vessels had narrowed to an estimated five to six miles at approximately 2:10 a.m. the mate testified that he saw the green running light of the Leopard and determined that the positions and courses of his vessel and the Marine Leopard called for a starboard-to-starboard passing. He testified that the Olson continued its 320° course until 2:15 a.m., when it made a 10° change to the left. Witnesses aboard the Olson testified that a two-blast whistle was sounded by the Olson to indicate this change of course. Olson witnesses stated that during this entire period the lights of the Leopard remained on the Olson's starboard bow, from one to four points. It was the contention of

Olson & Co. that soon after the helmsman had steadied the ship on her new course of 310°, the range lights of the Marine Leopard closed and her green running light shut out and her red light began to show. To someone in the position of the Olson this naturally indicated a right turn or swing on the part of the Marine Leopard.

Zinkiewicz testified that on seeing the Leopard swing across his bow, he signaled full astern on the engine room telegraph and at about the same time ordered the helmsman to "keep coming left." Neither of these actions was accompanied by whistle signals. The second mate's last minute efforts were unavailing and the collision occurred within a minute after the last order. The stem of the Leopard struck the Olson on the starboard side at an eighty to ninety degree angle about amidship and cut almost completely through her before coming to a stop and backing off. The crew members of the Olson were forced to abandon ship in such haste that they were unable to launch a lifeboat. Four of the Olson's crew lost their lives.

Luckenbach's concept of the collision differs materially from the one put forth by Olson & Co. Testimony most favorable to Luckenbach shows that at midnight, prior to the collision, the third mate, Doyle, assumed the watch. Except for a minor variation of short duration, the Marine Leopard maintained a course of 156° true, and a speed of approximately 17 knots from the time Doyle took over until a few minutes after 2:30 a.m. About 1:30 a.m. the Leopard's lookout sighted a white light and reported it to the bridge as being a white light dead ahead. The white light eventually was identified as coming from the Howard Olson. The report was received by Doyle.

The Leopard had been following the Waterman on substantially the same course since leaving San Francisco the previous day and, because the Waterman was traveling

at a slightly slower speed than the Leopard, the latter was gradually overtaking her. The Waterman was almost broad on the Leopard's port beam and about .3 to .4 miles off when the Olson's lights were reported.

Captain Snow of the Leopard had left written instructions to be called fifteen minutes prior to coming abeam of any light along the coast. A few minutes before 2:00 a.m. Doyle sent word to the Captain that the vessel would be abeam of Point Sur in fifteen minutes. The Captain arrived on the bridge at approximately 2:00 a.m. and Doyle reported to him the position of the Waterman and the Olson, and the speed of the Leopard. The mate testified that when the Captain came on the bridge at 2:00 a.m. the Howard Olson was one point on the port bow. The Captain observed the lights of the Howard Olson and he testified that he found them to be "very near ahead." The Captain, then determined that if the Leopard continued on her course of 156° she would pass further off Point Sur than he originally intended and, therefore, ordered the course to be changed to the left to 150°. This occurred at 2:02 a.m.

The Leopard continued on a course of 150° until 2:10 a.m. when the Captain saw the red and green lights as well as the range lights of the Olson about four miles distant. The Captain then changed course to the right to 152° in order to give the Olson more room for the port-to-port passing which he contemplated. The 152° course was maintained until the gap between the two vessels narrowed to a little less than three miles, at which time the Leopard gave way more to the right and pursued a heading of 154°. Then, when the vessels were approximately two miles apart, the Captain ordered 2° more to the right, to 156° true, but before the helmsman could steady on that course the Cap-

tain ordered him to "keep coming right," which caused the Leopard to drift to the right. The Leopard continued on this rightward drift for about half a minute, and then at 2:16½ the Captain ordered a "hard right." The Leopard witnesses testified that she maintained this hard right course for a minute and a half until 2:18, when the ships collided. The Captain testified that the hard-right maneuver was necessitated by the fact that the Howard Olson had suddenly cut across the Leopard's bow.

The Marine Leopard did not signify any of her course changes with whistle blasts. The Captain testified that it was not customary to blow whistles at sea every time a minor course change was made.

It is the contention of each of the owners of the vessels involved that the collision was caused by the sole fault of the other. On the other hand, the proctors for the cargo claimants, who actively participated in the trial, contend that there is mutual fault. I will first consider the charges made against the Howard Olson.

One of the main areas of controversy during the trial was whether the vessels were meeting end on, or nearly end on, prior to the collision. If so, Article 18 of the International Rules for Navigation at Sea, as set forth in 33 U.S.C.A. § 146b(a), known as the head-and-head rule, was applicable. Article 18 provides:

> "(a) When two power-driven vessels are meeting end on, or nearly end on, so as to involve risk of collision, each shall alter her course to starboard, so that each may pass on the port side of the other. This section only applies to cases where vessels are meeting end on, or nearly end on, in such a manner as to involve risk of collision, and does not apply to two vessels which must, if both keep on their respective courses, pass clear of each other. The only cases to which it does apply are when each of two vessels is

end on, or nearly end on, to the other; in other words, to cases in which, by day, each vessel sees the masts of the other in a line, or nearly in a line, with her own; and by night, to cases in which each vessel is in such a position as to see both the sidelights of the other. It does not apply, by day, to cases in which a vessel sees another ahead crossing her own course; or, by night, to cases where the red light of one vessel is opposed to the red light of the other or where the green light of one vessel is opposed to the green light of the other or where a red light without a green light or green light without a red light is seen ahead, or where both green and red lights are seen anywhere but ahead."

Any discussion of the applicability of Article 18 in the instant case necessarily concerns the navigational lights of each vessel. There was no substantial evidence that each vessel did not have required lights properly positioned and brightly burning and I therefore find that such was a fact.

Since the meeting took place at night each vessel must have been "in such position as to see both sidelights of the other" ahead in order for the rule to be applicable.

Captain Snow of the Marine Leopard testified that at 2:10 when the vessels were approximately 3.3 miles apart he saw both sidelights of the Howard Olson about 3° off the port bow. Within the next four to six minutes he executed a series of three course changes to the right and during this period only the red sidelight of the Olson was seen, either dead ahead or slightly on the port bow. Doyle, who was on the bridge with the Captain at this time, gave substantially the same testimony.

Article 18 requires that both sidelights must be seen ahead in order for the vessels to be considered meeting

end on or nearly end on. However, I believe that a variance of 3° from dead ahead is not sufficient in this instance to say that Captain Snow was in error in concluding at 2:10 that Article 18 was applicable. Therefore I am satisfied that the requirements of Article 18 were fulfilled so far as the Marine Leopard was concerned. The subsequent observation of a red light is a natural result of the adoption of a port-to-port passing as prescribed by the rule.

But the Article requires that each vessel must see both sidelights of the other ahead. If the testimony of the majority of the crew members of the Olson who observed the lights of the Leopard was accepted, I would have to hold that Article 18 did not apply, since, in substance, they testified that they saw only the green light of the Leopard from the time the sidelight was first sighted until a few minutes before the collision, and that light was not ahead but was bearing from one to four points on the starboard bow at various times during this period. The one exception to unanimity was the testimony of Olson's lookout who testified at a Coast Guard hearing a few days after the collision, and whose testimony was introduced at this trial by stipulation, that at what I deduced to be approximately 2:10 he saw momentarily the red light of the Leopard.

The two versions of the facts prior to the collision are irreconcilable. I think the Leopard's witnesses were the more credible and I accept their version. I believe that the red light of the Leopard, or perhaps both sidelights, was there for the Olson to see and would have been seen if those on board the Olson were sufficiently diligent in their observations. The lookout stated that he saw the Leopard's red light for a moment; I believe that it could have been observed for a substantially greater period of time, and perhaps was. Further, I believe that the lights were not on the port bow, but close to dead ahead.

There are a number of factors which influence me to accept the Leopard's version of the facts, some of which are worthy of discussion.

First, it was the position of Olson & Co. at the trial that the Howard Olson was so far to the starboard, or seaward, of the projected course of the Leopard that Article 18 did not apply. At the Coast Guard hearing a few days after the collision, Zinkiewicz testified that prior to any danger of collision he estimated that he would be three miles off Point Sur when abeam. At a subsequent Coast Guard hearing some five months later and at the trial of the instant action, the witness increased that estimate to three-and-a-half to four miles. His attempt at the trial to explain this discrepancy was unconvincing. This increasing estimate was necessary to substantiate Olson & Co's. main contention that the Howard Olson was far to the starboard of the projected course of the Leopard since it was established that the Leopard was 3.6 miles off Point Sur two or three minutes before the collision.

The evidence was uncontradicted that the Howard Olson at 10:00 p.m., some four hours before the collision, was abeam of, and three miles off, the Cape San Martin light, which is about forty miles south of Point Sur. She had a heading of 320° and continued on that course until her change to 310° shortly before the collision. At the trial, navigational charts were used by proctors for cargo and Luckenbach to show that if the course of 320° had been made good, the Olson would have passed abeam of Point Sur three miles off and would have been well on the port side of the projected course of the Leopard. Olson & Co. attempted to explain this adverse evidence by showing that the Howard Olson was set out from the coast by a current and failed to make good her 320° course. In sup-

port of this contention Olson & Co. pointed out that if the Howard Olson had maintained her course of 320° and the speed of eight knots which he was allegedly making at Cape San Martin, she would have passed Point Sur some time before the collision, and the fact that this had not been achieved is some evidence that a current had not only reduced her speed, but had set her out from the coast. There was no substantial evidence that a current did exist which would affect the Olson as her proctors claim. The fact that she did not in fact realize her estimated speed is more logically attributable to a partial failure of engine efficiency than to a current set.

Secondly, there is the testimony of an independent witness, the Mate Kittinger from the John B. Waterman, that as he viewed the two vessels on his radar screen from 2:04 until a few minutes prior to the collision they appeared to be on substantially opposite courses, with the Olson's course slightly to the eastward. However, I feel that any distance between the projected courses was not sufficient to call for any other than the port-to-port passing as prescribed in Article 18.

Kittinger testified that the fact that there were two vessels approaching the Olson (the Waterman and the Leopard) was a circumstance to be considered by the Olson in attempting to make a starboard-to-starboard passing with the Leopard. However, Zinkiewicz, the Olson mate, did not so consider it. He testified at the Coast Guard hearing, in answer to a question whether there was enough sea room to pass between the two vessels if the Olson had headed that way, that "there was plenty of room between me and the Waterman to get a battleship or an aircraft carrier in between and then some."

The many contradictions of the Olson's story made it apparent to me that the Leopard witnesses presented the more credible version. For these and other reasons, I am inclined to believe that at 2:10 when Captain Snow sighted both sidelights of the Olson and the Olson's lookout caught a glimpse of the red light of the Leopard, the vessels were end on, or nearly end on, and Article 18 was applicable. The Leopard's subsequent maneuvers to her right were in compliance with that rule, whereas the subsequent actions of the Olson violated it and constituted a fault which caused the collision.

There has been some reference in the memorandums filed after the trial that perhaps the positions of the two vessels prior to the collision constituted a crossing situation rather than a head-and-head approach. If the Court considered only that portion of the testimony that pointed to its being a crossing situation, the conclusion that the Olson was at fault would not be changed. The Olson would then be the burdened vessel and would be at fault for failing to keep out of the way (Rule 19, 33 U.S.C.A. § 146e), for crossing ahead of the Leopard (Rule 22, 33 U.S.C.A. § 146f), and for failing to slacken speed (Rule 23, 33 U.S.C.A. § 146g).

Even without predicating the finding of fault on the violation of statutory rules pertaining to passing, there is sufficient evidence to find that the Olson was at fault in maintaining her course and speed when there was a risk of collision. According to the Olson's witnesses, when the Leopard was first sighted at 1:40 she was one point on the starboard bow. If a safe starboard-to-starboard passing was to be effectuated, that bearing to starboard should gradually and consistently increase. Petition of the United States, (2 Cir., 1949) 178 F.2d 243. But when the side-

light of the Leopard became visible at a distance of from five to six miles, which would have been at approximately 2:04, they were observed to be still one point on the starboard bow. This would indicate that the vessels were on courses which presented the risk of collision. 33 U.S.C.A. § 146.2. What did Zinkiewicz do to relieve this hazardous condition? Basically his story is that at 2:15 he made a 10° course change to the left and sounded a two-blast whistle; that at 2:17 he ordered the helmsman to "keep coming left" and simultaneously telegraphed the engine room to change speed to full astern; and that the collision occurred at 2:19. Even if I found that Zinkiewicz's story as to time intervals was true, I doubt that it could be held to constitute a sufficient effort to take steps to avoid the collision. However, I am unable to rely on Zinkiewicz's estimate of the time of his orders, because I find that his first course change was somewhat less than his estimate of four minutes prior to the collision. Although the testimony is contradictory, the more reliable testimony is that the two-blast whistle was given within a minute to a minute-and-a-half prior to the collision when the vessels were at the most about 1,700 yards apart. Zinkiewicz testified that the whistle was sounded at the same time he gave the order and the evidence is uncontradicted that this was the first change of course which he made.

Zinkiewicz testified that he had taken a bearing at 1:48 and intended to take another bearing when abeam of Point Sur in order to establish his position from the coast. But in order to get an accurate measurement it was necessary to maintain his same course and speed until the vessel was abeam.

Whether the reason for the Olson's stubborn maintenance of her course without change was for the purpose

of permitting her mate in charge to get another bearing when abeam of Point Sur, as is contended by cargo and Luckenbach, I do not know. Whatever the reason, the Olson after having the lights of the oncoming Leopard in view for over sixteen miles, proceeded in a straight, undeviating course toward the Leopard when it was apparent that by so doing a risk of collision was involved. The Olson's 10° course change within a minute or one-and a-half minutes prior to the collision was too little and too late. I find this action of the Olson to be a fault which contributed to collision.

Luckenbach and cargo claimants have charged that the Olson was at fault for failing to repeat the two-blast whistle when it did not receive a reply from the Leopard and for failing to give the required whistle signals to inform the Leopard of the helm order "keep coming left" and the engine room order of full astern. 33 U.S.C.A. 147(a). If they had been given, they would have generally indicated that the Olson was maneuvering to her port. While the failure to repeat the two-blast whistle could be considered a contributing cause of the accident, I am of the opinion that the "keep coming left" and "full astern" orders of the Olson were given such a brief time before the collision that whistle signals by the Olson at that time would not have prevented the collision. The failure to give the whistle signals of the last two orders therefore was not a cause of the collision, since the vessels were committed to a collision course at that time.

There has been some contention that the Howard Olson was at fault in positioning her lookout on the bridge instead of the bow of the ship. There is no rule which designates the required position for a lookout, although there is substantial authority to the effect that the bow is

the proper place for the lookout, especially at night. Chamberlain vs. Ward, (1859) 62 U.S. 548; the Ottawa, (1866) 70 U.S. 268; The Colorado, (1876) 91 U.S. 692; The Yoshida Maru, (CCA 9, 1927) 20 F.2d 25; The Feltre, (CCA 9, 1942) 127 F.2d 86.

However, I am influenced by the reasoning of Puratich vs. U.S., (CCA 9, 1942) 126 F.2d 914, where the Court said at page 916:

> "* * * we see no possible connection between the happening of the collision and the failure of the Crosby to maintain a lookout in the forward part of the ship. The Lone Eagle was sighted as soon as her lights were turned on and her course and position were thereafter for nearly a quarter of an hour under constant and meticulous scrutiny. In the circumstances shown, a lookout in the bow would have contributed nothing to the 'eyes and ears' of the ship."

The lights of the Leopard were first observed by the Olson's lookout at 1:40 when almost sixtgen miles of water separated the two vessels. From the time of first observation until the collision, the lookout had an unrestricted view of those lights and a more forward position would not have enhanced this observation. Under these circumstances I find that the Olson was not a fault in positioning her lookout on the bridge.

Next, the liability of the Marine Leopard will be considered. Clearly, the Marine Leopard violated the statutory rule by failing to give whistle signals when effecting course changes, and it is equally clear that this violation was a causative factor of the collision. From 2:02 until the time of the collision, the Leopard made six different course changes and neglected to sound a whistle on each occasion. 33 U.S.C.A. § 147(a) provides:

"When vessels are in sight of one another, a power driven vessel under way in taking any course authorized or required by sections 122-147(d) of this title shall indicate that course by the following signals on her whistles, namely:

"One short blast to mean 'I am altering my course to starboard.'

"Two short blasts to mean 'I am altering my course to port.'

"Three short blasts to mean 'My engines are going astern.'"

Conceding that whistle signals for some of the earlier changes, when the vessels were three or more miles apart, would not have been heard, three of the six course changes were made well within that distance, and if signals had been sounded the Olson would have been aware of the Leopard's intention and could have adjusted course accordingly. I have no hesitation in finding the Leopard was at fault in failing to signal her course changes, and that this fault was one of the causes of the collision.

As I have previously noted, I find that Article 18 [33 U.S.C.A. § 146(b)], commonly known as the head-and-head rule, was applicable. The Captain of the Marine Leopard made a like determination and testified that his course changes were effected in conformance with that rule, and I must agree. However, I feel that the Leopard was at fault in making, without whistle signals, piecemeal changes instead of one or more definite, substantial course changes. If such had been done, the Olson probably would have been aware of it and would have come to the correct conclusion as to the Leopard's contemplated course.

Olson & Co. contend that the statutory fault of the Leopard was so flagrant that the "major and minor fault rule" is applicable. That rule was concisely stated in

Alexander vs. Machen

(1893) 147 U.S. 72, 85; 13 S.Ct. 211, 216; 37 L.Ed. 84, 85:

"Where fault on the part of one vessel is established by uncontradicted testimony and such fault is, of itself, sufficient to account for the disaster, it is not enough for such vessel to raise a doubt with regard to management of the other vessel. There is some presumption at least adverse to its claim, and any reasonable doubt with regard to the propriety of the conduct of such other vessel should be resolved in its favor." Accord, The Victory (1897) 168 U.S. 410, 18 S.Ct. 149, 42 L.Ed. 519; The Ludwig Holberg (1895) 157 U.S. 60, 15 S.Ct. 477, 39 L.Ed. 620; U.S. vs. Shaw, Savill & Albion Co., CCA 2, (1949) 178 F.2d 849; Theo Thelatos vs. Morgan Marine Transp. Co. (CCA 4, 1942) 127 F.2d 1016; General Sea Foods Cor. vs. J. S. Packard D. Co. (CCA 1, 1941) 120 F.2d 117.

I feel that the facts of this case do not show such an extreme variance of degree of fault as to support the application of the rule. Granting that the Marine Leopard's failure to sound change of course signals was a serious fault and was sufficient in itself to cause the collision, the same charges could appropriately be made against the Howard Olson in failing to conform to the head-and-head rule and also for stubbornly maintaining course and speed when the constant bearing disclosed a risk of collision.

Both vessels involved in the collision were equipped with radar. The officer in charge of each ship testified that it would have been possible to accurately chart the course and speed of the other ship by using the radar. Yet neither ship used its radar for that purpose. The Olson radar was not even placed in operation and the Leopard radar was used only to make observations of the position of the Olson from time to time.

Although the night was clear and each saw the lights of the other for a considerable period of time, the fact that those lights maintained an almost constant bearing on the respective bows should have given some indication that there was a risk of collision. Whatever course each thought the other was pursuing, the collision is stark evidence that their estimation was incorrect. However, if either had taken the trouble to plot the course of the other by radar, the fact that there was a risk of collision would have been all the more apparent to both and corresponding adjustments in course could have been made. This would be especially true in the case of the Howard Olson. The mate Zinkiewicz was adamant in his contention that the situation called for a starboard-to-starboard pass. Perhaps his conviction would have been shaken had a radar plot disclosed the Leopard's five course changes to her right.

While I hesitate to go so far as to hold that each vessel was at fault for failing to utilize the full potentials of its radar, I do believe that Snow and Zinkiewicz's actions in this regard constituted poor seamanship.

Little discussion is necessary in passing on the petition of Olson & Co. for limitation of liability. 46 U.S.C.A. § 183 provides in substance that the liability of the owner of a vessel shall not exceed the value of the owner's interest in the vessel and her pending freight if the injury or loss giving rise to the liability was incurred without the privity or knowledge of the owners. It appears to me that the faults committed by the Howard Olson which contributed to the cause of the collision were faults in seamanship by the mate in charge at and prior to the time of the collision, and there is no substantial evidence connecting the owner to these faults within the meaning of this Code Section.

Proctors for cargo claimants contend that Olson & Co.

has not complied with the statutory requirements for limitation of liability. I see no basis for this contention, and the petition should be granted.

Proctors for cargo to prepare such findings of fact, conclusions of law and decree for that portion of the litigation which culminated in a finding of mutual fault as may be appropriate. Proctors for Olson & Co. to prepare such findings of fact, conclusions of law and decree for that portion of the litigation which related to the petition for the limitation of liability as may be appropriate.

Dated: June 4th, 1957.

/s/ O. D. HAMLIN,
United States District Judge.

[Endorsed]: Filed June 4, 1957.

[Title of District Court and Cause.]

Nos. 27332, 27376 and 27412 in Admiralty

NUNC PRO TUNC ORDER

On the Court's own motion, line 23, page 10, of the Court's opinion in the above-entitled matter, filed on June 4, 1957, is changed to read "slightly to the westward. However, I feel that any distance," in place and instead of "slightly to the eastward. However, I feel that any distance."

Dated: June 27, 1957.

/s/ O. D. HAMLIN,
United States District Judge.

[Endorsed]: Filed June 27, 1957.

ORIGINAL OPINION OF COURT OF APPEALS

United States Court of Appeals
for the Ninth Circuit

Oliver J. Olson & Co., a corporation, *Appellant*, vs. Luckenbach Steamship Company, a corporation, *Appellee*.	No. 15,766 April 27, 1960
Marine Leopard Cargo, *Appellant*, vs. Oliver J. Olson & Co., a corporation, et al., *Appellees*.	

Appeals from the United States District Court for
the Northern District of California
Southern Division

OPINION

Before: Magruder, Hamley, and Merrill, Circuit Judges

HAMLEY, Circuit Judge:

This is an admiralty case involving a collision at sea between the SS Howard Olson and the SS Marine Leopard.

The Leopard is a C-4 freighter 622 feet 10 inches long with a beam of 71 feet 7 inches and 10,662.53 tons gross register. The Olson was a 261-foot lumber schooner of 2,477 gross tons. The Olson left San Pedro, California, in ballast, during the afternoon of May 12, 1956, northbound for Coos Bay, Oregon. The Leopard departed San Francisco

on the morning of May 13, laden with 11,766 tons of cargo, bound down the coast to San Pedro.

In the early hours of May 14, 1956, the two vessels, proceeding in opposite directions, approached Point Sur off the California coast. The night was bright and clear, and visibility was unlimited. There was a northwest wind of force two or three, a northwesterly swell, and a moderate sea. Both vessels had the lights required of a steamer navigating at night, and they were properly positioned and burning brightly.

The vessels sighted each other's lights at approximately 1:40 a.m., when they were almost sixteen miles apart, and were in sight continuously thereafter until they collided. The speed of the Leopard was about seventeen knots and that of the Olson about eight knots. In the course of their approach the Leopard turned to the right and the Olson turned to the left. They collided at approximately 2:19 a.m. at a point from three and a half to four and a half miles off Point Sur.

The collision resulted in the sinking and total loss of the Olson, the death of four of its crew members and the injury of others, and damage to the Leopard and its cargo.

Oliver J. Olson & Co., owner of the Olson, filed a libel *in rem* and *in personam* against the Leopard and its owner, Luckenbach Steamship Company. Damages in the sum of $450,000 representing the market value of the Olson, $1,268.24 for loss of cash on board, $9,543.91 for loss of ship's inventory, and an unspecified sum for unascertained losses were sought. Luckenbach answered denying liability. Luckenbach also filed a libel *in personam* against Oliver J. Olson & Co. Damages in the approximate sum of $400,000 were sought as compensation for costs of repairs to the Leopard, expenses during detention, and loss of use and profit. The Olson Company answered denying liability.

Oliver J. Olson & Co. thereafter filed a petition for exoneration from or limitation of liability pursuant to 46 U.S.C.A. secs. 181-189, inclusive. Answers to this petition asking that it be denied were filed by Luckenbach, various cargo claimants, and one personal injury claimant.

These actions were consolidated for trial on the issues of fault and limitation of the Olson Company's liability. After a trial the district court filed an opinion, reported in 152 F. Supp. 197, determining that the collision was caused by the mutual fault of personnel on the two vessels. The court further held that the owner of the Olson was entitled to limit its liability to an amount not exceeding the amount or value of its interest in the Olson and her freight then pending.

Findings of fact, conclusions of law, and an interlocutory decree consistent with the court's written opinion were thereupon entered. It was adjudicated that both vessels were at fault for the collision and that the owner of the Olson was entitled to limitation of liability. The court ordered that the damages thereby incurred be divided between the shipowners in accordance with the law in admiralty cases of mutual fault.[1] It was directed that the cases be referred to a United States Commissioner to take testimony and report to the court concerning matters of damage. All questions in respect to the division of damages and application of the statutes for limitation of liability were reserved for later decision.

Oliver J. Olson & Co. has appealed from that portion of the interlocutory decree wherein fault was attributed to the Olson, asserting that the collision was the sole fault of the Leopard.[1] Luckenbach has not appealed, and therefore

[1] Appeals from interlocutory decrees determining the rights and liabilities of the parties in admiralty cases are permitted under 28 U.S.C.A. sec. 1292(a)(3).

the faults of the Leopard are admitted and are not in issue on this appeal. Marine Leopard Cargo (Cargo), representing various claimants in the limitation of liability proceeding, has appealed from that portion of the decree wherein the liability of the Olson Company was limited.[2]

The Issue of the Olson's Fault

The trial court determined that the Olson was at fault in two particulars: (1) in attempting to pass the Leopard starboard to starboard; and (2) in maintaining her course and speed when there was risk of collision and failing to take positive and proper action in ample time to avoid collision and the risk of collision.[3]

The Olson Company contends that its vessel was not at fault in either of these particulars, and that the trial court erred in holding otherwise.

The first of these asserted faults (attempting to pass the Leopard starboard to starboard) brings into question the applicability of Article 18 of the International Rules for Preventing Collisions at Sea, 33 U.S.C.A. sec. 146b(a). Under this rule, when two power-driven vessels are meeting

[2]The cargo so represented was all carried aboard the Leopard. The Olson was in ballast and had no cargo. By reason of the contractual arrangement between the Leopard and its cargo and of the provisions of the Carriage of Goods by Sea Act, 46 U.S.C.A. secs. 1300 et seq., the Leopard is not liable to its own cargo for damage caused by negligence in the navigation or management of the Leopard. The Leopard cargo may, however, recover damages from the Olson Company if that company's liability is not limited pursuant to 46 U.S.C.A. sec. 183, and if the Olson as well as the Leopard is held to be at fault. Thus, on this appeal Cargo not only attacks the provision of the decree limiting the Olson Company's liability, but joins Luckenbach in defending the provision of that decree holding the Olson as well as the Leopard to be at fault.

[3]The trial court determined that the Leopard was at fault in failing to sound whistle signals on her course changes and in making piecemeal changes instead of one or more definite, substantial course changes. As above noted, this determination is not here in question.

end on, or nearly end on, so as to involve the risk of collision, each shall alter her course to starboard so that each may pass on the port side of the other.

Article 18 provides that vessels are deemed to be meeting end on, or nearly so, at night only if each vessel is in such a position as to see both the sidelights of the other ahead.[4] As further indicated in this rule, an alteration of course is not required at night in cases where the red light of one vessel is opposed to the red light of the other ahead, for then they will safely pass port to port, and they must so pass. Nor is an alteration of course required where the green light of one vessel is opposed to the green light of the other, for then they will safely pass starboard to starboard, and they must so pass.

As the Leopard approached the Olson she made several course changes to the Leopard's starboard and endeavored to pass the Olson port to port. As the Olson approached the Leopard she made no course changes until the risk of collision became imminent. She then made a course change to her port and endeavored to pass the Leopard starboard to starboard.

Therefore, with regard to the asserted fault of the Olson in attempting to pass the Leopard starboard to starboard, the critical question of fact is whether the Olson saw or should have seen the red light or the red and green lights of the Leopard ahead. If she saw or should have seen the Leopard's red light ahead, the Olson should not have attempted a starboard-to-starboard passing. She should have continued her course and passed port to port. If she saw

[4]The reference in this rule to "sidelights" is to the green sidelight which must be carried on the starboard side and the red sidelight which must be carried on the port side of each vessel. See Article 2, International Rules for Navigation at Sea, 33 U.S.C.A. Sec. 145(a)(iv), (v), and (vi).

or should have seen the Leopard's red and green lights ahead, she should have altered her course to starboard and passed port to port.

The trial court resolved this question of fact in favor of the Leopard. Specifically, the court found that the vessels were situated end on or nearly so within the meaning of Article 18, and each was therefore required to alter course to the starboard and pass port to port. Implicit in the finding that the vessels approached end on is the further finding that as the vessels approached each other each saw or should have seen both the red and green sidelights of the other ahead.

The Olson Company challenges this finding of fact, arguing that the evidence required a finding that the Olson saw only the green sidelight of the Leopard ahead. The Olson Company also contends that the trial court erred in excluding opinion testimony bearing upon the question as to which side of the Leopard the Olson should have passed.

This second contention will be dealt with first. The testimony which was excluded was a portion of that of Kenneth E. Kittinger. As second mate of the freighter John B. Waterman which was proceeding south shoreward of the Leopard, he had witnessed the approach of the Olson and the collision of the two vessels. Testifying by deposition, Kittinger described the positions of the Leopard and Olson as he had observed them. He stated that it had appeared to him that the Leopard and Olson were meeting on opposing courses and that the Leopard was slightly to the eastward, "which would make it apparent to me that there would be a starboard-to-starboard passing."

Two questions were then asked of Kittinger designed to elicit his expert opinion as to what alteration of courses

the vessels should have made to effectuate a safe passage, and what the circumstances called for with respect to "the duties and obligations" of the Olson and Leopard.[5] The first such question was objected to, and the objection was sustained, on the ground that Kittinger did not know the courses of the Leopard and Olson and therefore could not possibly determine what course alterations they should have made.

The second of these questions was objected to on the same ground and on the further ground that the question called for a conclusion of law which was for determination by the trial court. The objection to the second question was sustained upon this second ground.

Persons of nautical skill and experience are usually permitted to express an expert opinion with regard to any disputed question of navigation not controlled by statutory rules of navigation. The City of Washington, 92 U. S. 31, 39.[6]

Here, however, except for the possible existence of a "special circumstance," to be discussed below, the side of passing and the course changes, if any, which the Leopard

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[5]The two questions were:

"Q. At the time that you made the observation that it appeared that it would be a starboard-to-starboard passing, can you tell, Mr. Kittinger, in your opinion and from your observation and from your experience of 12 years as a watch officer, what direction you believe the vessels should have changed course to widen the distance between their projected courses, if necessary, and effectuate a safe passage?"

"Q. Taking the position that you have plotted for the Olson and for the Leopard at 0204 and considering that all you have is merely the opportunity of seeing what you saw on the radar scope, what did that situation indicate to your mind with respect to the duties and obligations of those two ships?"

[6]As stated in Griffin on Collision, sec. 274, page 631 (1949): ". . . such evidence is clearly admissible on questions of the usages of navigation, arising outside the scope of the statutory rules . . . ."

and Olson should have made were prescribed by Article 18, depending upon what sidelights each vessel saw. It follows that unless the "special circumstance" rule applied there was no room for an expression of opinion by Kittinger as to course alterations which should have been made, or the duties and obligations of the Olson and Leopard in this meeting situation.[7]

A departure from the rules for navigation, including Article 18, may be necessary under special circumstances in order to avoid immediate danger. Article 27, International Rules for Navigation at Sea, 33 U.S.C.A. sec. 146k. Kittinger testified that in his opinion a special circumstance confronted the Olson, consisting of the presence of the Waterman to the port of the Leopard.[8] Because of this circumstance, Kittinger stated, he would not have considered passing between the Leopard and the Waterman in order to pass to the Leopard's port, if he had been navigating the Olson. Nor would he, Kittinger testified, have considered crossing in front of the Waterman for

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[7]Kittinger could, of course, testify as to any facts or express an expert opinion based on his observations as to what sidelights the Olson and Leopard saw or should have seen. Kanatser v. Chrysler Corp., 10 Cir., 199 F.2d 610, 618. He did testify that not being on either the Leopard or Olson he would not be able to say what lights of the other either of them would see. He also testified that while the Leopard and Waterman were on apparently parallel courses he had no knowledge of the actual courses of the Leopard and Olson. Kittinger further testified that the Olson seemed to him to be somewhat westward of the Leopard, and gave other testimony from which conclusions could be drawn as to the relative positions of the two vessels.

[8]The Leopard and the Waterman were proceeding along roughly parallel courses down the coast, with the Leopard seaward of the Waterman. When the Leopard overtook the Waterman about nineteen minutes before the collision the two vessels were a half mile apart. At the time of the collision there was between three quarters of a mile and a mile of water between the Waterman and the other two vessels.

the purpose of passing to the port of both southbound vessels.

It may be that a like expression of opinion was sought in asking the two questions concerning which objections were made and sustained. If so, such expressions would have been cumulative and their exclusion was not prejudicial.

Apart from this however, it would appear that the Olson Company is in no position to rely on the special circumstance rule. The invoking of that rule here presupposes that except for such circumstances a port-to-port passing pursuant to Article 18 would have been required. In that event the Olson would have been obliged, upon perceiving the circumstance, to alter course to its port so as to pass starboard to starboard.

The Olson, however, made no course change until the risk of collision became imminent. It is therefore clear that Second Mate Felix Zinkiewicz, who was on the bridge of the Olson at the time, did not consider that he was faced with a special circumstance warranting departure from article 18.[9] He was simply proceeding on the basis that he was green to green with the Leopard and therefore would pass safely starboard to starboard without altering course.

Matters pertaining to the examination of expert witnesses rest largely within the discretion of the trial court. Andersen v. United States, 9 Cir., 237 F.2d 118, 125. For the reasons stated above we hold that the trial court did not abuse its discretion in sustaining the objections to the questions propounded to Kittinger.

This brings us to the Olson Company's principal contention on this branch of the case, that is, its challenge to

[9]He testified, in fact, that there was enough room between the Waterman and the Leopard "to get a battleship or an aircraft carrier in there, and then some."

the finding of fact that as the vessels approached each other they each saw or should have seen both sidelights of the other.

The testimony of personnel on the two vessels which collided was in sharp dispute on most points pertinent to this finding of fact. They disagreed as to the positions of the two vessels at various times, the courses and course changes, and the running lights which could or could not be seen.[10] This conflict in the testimony is discussed at considerable length in the opinion filed by the trial court and need not be repeated here.

Observing that the two versions of the facts are irreconcilable, the trial court stated that it found the Leopard's witnesses more credible. The court therefore accepted their version. In its opinion the trial court discussed some of the factors which influenced it in placing credit in the Leopard's witnesses. The Olson Company questions some or all of the reasons so discussed, but we do not find these arguments of appellant convincing.

That company, however, places chief reliance upon the contention that its case is not dependent upon the credibility of any witness with respect to any point which is contradicted. What is meant by this, apparently, is that if all of the conflicting testimony of personnel on the Olson and Leopard concerning the factors noted above is disregarded,

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[10] For example, as to the sidelights which were visible, the captain and third mate of the Leopard testified that they saw both the red and green sidelights of the Olson indicating an end-to-end approach and a port-to-port passing. The second mate and two seamen on the Olson, on the other hand, testified that until her last-minute starboard swing they saw only the green light of the Leopard indicating a starboard-to-starboard passing. One of the Olson's seamen, however, testified that he "momentarily" saw the Leopard's red light. The Olson Company accounts for this as due to yawing of the Leopard. Kittinger's testimony bearing upon this point was inconclusive.

there is other independent evidence not involving the matter of credibility which requires that the findings of fact be set aside.

As in the case of appeals governed by Rule 52(a), Federal Rules of Civil Procedure, 28 U.S.C.A., findings of fact entered by the trial court in an admiralty case are not to be set aside unless clearly erroneous. McAllister v. United States, 348 U. S. 19, 20. This being true, it would appear that there should also be applied in admiralty cases the caution recited in Rule 52(a) that "due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." If, however, as appellant contends, some undisputed fact or facts render the credibility of the oral testimony extremely doubtful, the findings of the trial court, though predicated upon the credibility of witnesses, may be held to be erroneous. Arnold Corp. v. Stanson Corp., 7 Cir., 189 F.2d 5, 10.

The precise question, then, is whether the asserted independent evidence to which the Olson Company refers indisputably establishes facts so inconsistent with the oral testimony which the trial court has credited that we ought to override findings of fact based upon such oral testimony.

The independent evidence to which the Olson Company refers consists of five items: (1) The position of the Olson at 2:04 a. m., as testified to by the witness Kittinger; (2) the position of the Leopard at 2:04 a. m., as testified to by Kittinger; (3) the track of the Leopard, as indicated by her own course recorder; (4) the point of collision, as determined by the place where the Leopard was at 2:19 a. m.; and (5) the track of the Olson from 2:04 a. m. until a few minutes before the collision, based upon testimony concerning the Olson's course given by persons who were aboard the Olson and the asserted physical fact that the track contended for by the Olson Company was the only

course that could get the Olson from her 2:04 a. m. position to the point of collision in the time allotted.

It is argued that these five items of evidence prove that the approach of the vessels was green to green, starboard to starboard. A chart attached to the Olson Company's brief, purporting to translate this independent evidence into positions and courses, shows the two vessels approaching green to green with a safe starboard-to-starboard passing indicated except for the Leopard's course changes to her starboard during the last few minutes preceding the collision.

These items of evidence unquestionably have great probative value. However, the issue here is not what weight the trial court could have given these items of evidence but whether the court was required to give them controlling effect over the other evidence.

The 2:04 a. m. position of the Olson, as asserted established by the independent evidence, was based partly on a radar bearing on the Olson made by Kittinger, who was on the Waterman at that time. It also involved a determination as to the Waterman's position at that time arrived at in a manner to be described. The Olson Company asserts that the radar bearing showed that the Olson was "exactly" five degrees off the Waterman's starboard bow and "exactly" six miles away. Kittinger, however, did not testify that this bearing and distance were exact. As a matter of fact, he used the words "a little less than" in referring to the distance.[1]

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[1] Kittinger testified

"I took a bearing at 2:04 and had him bearing five degrees on my starboard bow, which would be 175 true, six miles distance.

"Q. By Mr Harrison. Could you tell me, Mr Kittinger, whether or not at 0204, in your opinion, you [illegible]

Kittinger did not write down his 2304 bearing on the Olson, but plotted it on his radarscope with a grease pencil which, he said, "is easily wiped off." It is debatable whether or not the limitations and inaccuracies to which radar is subject could have affected the reading which Kittinger obtained at 2304.* There is also room for arguing that Kittinger's 2304 radar bearing on the Olson is inconsistent with Zinkiewicz's testimony concerning the Olson's 320 degree course. Unless, as the Olson Company asserts and Luckenbach denies, the Olson experienced a westerly "set" as it proceeded up the coast, it could not have been at the point where Kittinger's 2304 bearing showed it to be.

But, as indicated above, the determination of the Olson's position at 2304 is based not alone on Kittinger's 2304 radar bearing, but also upon a computation made by him in order to determine the position of the Waterman west

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* That those two vessels were in a situation where the Inland [illegible] rule applies

A Well they were still a little over their six miles distance I would say. No. I wouldn't consider that rule necessarily applies.

"Mr Mackey You would say what

"The Witness I could not see any of their colored lights and they were still a little less than six miles apart at 0304

"Mr Harrison And I said

Q By Mr Harrison At 0 for those reasons you say A at 0304 And the Olson at six miles the Leonard was just forward of my beam

Q Now at 2304 was the only time that you took a plot on the Howard Olson A That is correct An actual bearing and distance Q In taking that plot you reached the conclusion that she was five degrees on your starboard bow and about six miles away from you A Well that was fact I mean that was from the radar reflection Q That you accept A That I accept, yes, sir.

For a discussion of some of the legal problems arising from possible technical inaccuracies see 14 Proceedings of The Maritime Council, United States Coast Guard 167 (October 1957 Gilmore & Black, Admiralty 424-424 1957)

he made that bearing. Kittinger made this computation by projecting the Waterman's course back from her radar-ascertained position abeam Point Sur 3.2 miles away at 2:16 while on a course of 153 degrees. The Olson Company asserts that this computation was made "with absolute accuracy" which "has never been questioned."

Kittinger, however, did not testify that his computation was absolutely accurate, and the briefs of Luckenbach and Cargo indicate that the computation is questioned. In order to project the Waterman's course back from the 2:16 Point Sur bearing to 2:04, Kittinger had to ascertain the distance covered over the Waterman's 153-degree course between 2:04 and 2:16. He did this by applying his estimate of the Waterman's speed to the time interval between 2:04 and 2:16.

The estimate of speed was arrived at by dividing the distance traveled by the Waterman between 1:05 and 2:16 a. m. by the one hour and eleven minutes consumed between those two times. Kittinger "figured" the distance to be 18.75 miles and thereby arrived at a speed of "15.87." Kittinger testified that in making this computation he "made no allowance for that minor course change that I had at nine degrees."

By this process, which according to Kittinger required "dead reckoning," a distance of 3.17 miles between the Waterman's 2:04 and 2:16 positions was arrived at. Kittinger then projected the Waterman's course back 3.17 miles over the course of 153 degrees, and thus arrived at the Waterman's 2:04 position. It was on the basis of the Waterman's position so determined and Kittinger's 2:04 radarscope reading of the Olson that the latter's 2:04 position was ascertained.

We think enough has been said to indicate that the 2:04 position of the Olson, upon which the Olson Company

relies as a necessary part of its independent evidence, was not established beyond question.

The same conclusion is required with regard to the Olson Company's independent evidence as to the Leopard's position at 2:04. That company states in its brief that Kittinger located the Leopard at 2:04 on his radar screen and plotted it in relation to the "known" location of his own vessel. The "known" location of the Waterman at 2:04 was arrived at in the manner described above and accordingly was not established beyond dispute.

The evidence also indicates that while Kittinger observed the Leopard on his radar when she was abeam at 2:00 a. m. he made only a visual observation at the critical time of 2:04. Kittinger did not determine the exact distance between the Waterman and Leopard at 2:04. On the basis of his radar observation at 2:00 he estimated that at 2:04 the Leopard was just outside the 5 10ths range, "possibly 6 10ths" of a mile away. When asked to place on a chart the approximate position of the Leopard at 2:04, Kittinger testified: "It would only be an approximation."[13]

The third item of the Olson Company's independent evidence relates to the track of the Leopard as indicated by her own course recorder. However accurate and reliable the course recorded was, there would still inhere in the track so ascertained any error resulting from an inaccurate positioning of the Leopard at 2:04. Some uncertainty in connection with this item of evidence also arises from the dispute between the parties as to the time differential between the course recorder and the clock on the Leopard's bridge. An additional uncertainty is occasioned by the fact testified to at the trial, that a ship turning in the

[13] It should be noted that for purposes of arguing another point Luckenbach indicated that it would "assume" the accuracy of the position of the Leopard at 2:04.

water is not like a locomotive on tracks, but tends to skid sideways through the water before settling on her new course.

The fourth item of evidence has to do with the point of collision. The Olson Company's independent evidence locates this point at the place where the Leopard's forward movement ceased when it came into collision with the Olson at 2:19. But it is plain that any uncertainties found to exist in connection with determining the Leopard's position at 2:04 and her track thereafter, as discussed above, would be reflected in this way of ascertaining the Leopard's position at 2:19. Moreover, a new uncertainty is interjected at this point due to the inability to accurately determine how much forward movement the Leopard experienced after it came into collision with the Olson.

The fifth and final item of independent evidence upon which the Olson Company relies relates to the track of the Olson from 2:04 to the point of collision.

The Olson Company asserts that the Olson's track after 2:04 can be determined in either one of two ways. One of these is to simply draw a line from her 2:04 position to the point of collision. The Olson Company argues that considering the Olson's maximum speed the line so drawn, as depicted on the chart attached to its brief, is the only course that could get the Olson from her 2:04 position to the point of collision in the time allotted.

Assuming this to be true, there would still inhere in such determination any error which may have occurred in fixing the Olson's position at 2:04 and the point of collision at 2:19. The possibility of errors in fixing these positions has been discussed above.

The Olson Company also argues that the track of its vessel after 2:04 can be definitely ascertained by plotting

her course which, according to the testimony of all on board the Olson, was 320 degrees until a few minutes before the collision. The beginning position of a track so plotted would be affected by any error Kittinger may have made in fixing the Olson's position at 2:04. Moreover, the asserted 320-degree course of the Olson at 2:04 was in serious dispute. The resolution of that dispute called for a determination of what westerly set, if any, the Olson experienced before and after 2:04.

We do not undertake to say that any particular area of uncertainty discussed above necessarily deprives the Olson Company's independent evidence of high probative value. We do conclude that enough uncertainty is connected with these five items of evidence so that they may not fairly be labeled as indisputable. Therefore, the independent evidence upon which the Olson Company relies does not, in our opinion, warrant disregard of the trial court's appraisal of witness credibility.

We conclude that the finding of fact that as the Olson and Leopard approached each other they saw or should have seen both the sidelights of the other is not clearly erroneous. Such finding being sustained, it follows that the Olson was at fault in attempting a starboard-to-starboard passing, no special circumstance existing which warranted such passing. It is unnecessary to decide whether the trial court erred in holding that the Olson was also at fault in other respects.

The Issue of Limitation of Liability

As before stated, Cargo, representing the owners of cargo aboard the Leopard, has appealed from that portion of the interlocutory decree wherein the liability of the Olson Company was limited. Provision for such limitation of liability

is contained in 46 U.S.C.A. sec. 183, paragraphs (a) and (e) of which are quoted in the margin.[14]

Findings of fact pertinent to the issue of limitation of liability were entered by the trial court after it had filed a written opinion. The court found that the master and crew of the Olson were properly licensed and competent to perform their duties; that there was no unseaworthiness of the Olson which contributed or could have contributed to the collision; that there were no owners or managing agents of the Olson aboard the Olson at the time of the collision; that the only cause of collision attributable to the Olson was the negligent navigation of the mate on watch; and that the acts or omissions of the mate were done without the privity or knowledge of the master or managing agents or owners of the Olson.

Cargo contends that the trial court erred in making these findings of fact, except the finding that the master and crew were properly licensed. Entry of these findings was error, Cargo asserts, because there was no evidence to support them.

With regard to this limitation issue, the fault of the Olson in all respects found by the trial court is to be taken for

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[14] "(a) The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not, except in the cases provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending."

"(e) In respect of loss of life or bodily injury the privity or knowledge of the master of a seagoing vessel or of the superintendent or managing agent of the owner thereof, at or prior to the commencement of each voyage, shall be deemed conclusively the privity or knowledge of the owner of such vessel."

granted. Petition of United States, The F.S. 231, 178 F.2d 243, 252. The owner of the Olson also has the burden of proving that the acts or omissions by reason of which the Olson was found to be at fault were done, occasioned, or incurred without the owner's privity or knowledge. States Steamship Co. v. United States, on petition for rehearing and on petition for rehearing on limitation, 9 Cir., 259 F.2d 458, 464, 474. With respect to loss of life or bodily injury the privity or knowledge of the master of the Olson at or prior to the commencement of the voyage, if any, is conclusively deemed the privity or knowledge of the owner. 46 U.S.C.A. sec. 183(c).

In our opinion there was ample evidence to sustain each of the questioned findings except the finding that no owners or managing agents of the Olson were aboard at the time of the collision. The general evidence bearing upon the way in which the collision occurred was sufficient to support the finding that it was not caused by unseaworthiness of the vessel. The same evidence and the additional evidence that the master and crew were duly licensed were sufficient to support the finding that the collision was caused by negligent navigation at the time, but not to incompetence of the master and crew.

It is recognized, of course, that there was considerable evidence tending to show that the second mate who was in charge at the time of the collision was not competent to navigate the Olson under the conditions then existing. Likewise, there was some evidence tending to show that the vessel may not have been seaworthy in some particulars. But it was for the trial court to evaluate this evidence along with all the other evidence in the case. The question is not whether there was some evidence tending to show unseaworthiness and incompetency, but whether such evidence

is so overwhelming that a finding to the contrary would be clearly erroneous. We hold that it is not.

These findings as to causation being sustained, the owner's burden of proving that the acts causing the collision were done, occasioned, or incurred without the owner's or master's privity or knowledge became relatively light. Negligence on the bridge, unconnected with general incompetency or unseaworthiness, could not be attributed to an owner who was ashore or to an owner or master who was on board but not on the bridge at the time. It was definitely established that neither the owner nor the master was on the bridge.[15]

It follows that the owner sustained the burden of proof placed upon him by section 183(a) and (e), and that the questioned findings are not clearly erroneous.

The interlocutory decree is affirmed both on the issue of fault and on the issue of liability.

(Endorsed) Opinion Filed April 27, 1960.

Frank H. Schmid, Clerk.

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[15]It is therefore immaterial whether the owner was aboard. Hence the finding that he was not, although not supported by evidence, was not prejudicial.

ORDER AMENDING OPINION OF COURT OF APPEALS

In the United States Court of Appeals
for the Ninth Circuit

Oliver J. Olson & Co., a corporation, Appellant, v. Luckenbach Steamship Company, a corporation, et al., Appellees.	No. 15766
Marine Leopard Cargo, Appellant, v. Oliver J. Olson & Co., a corporation, et al., Appellees.	

ORDER

On Petition for Rehearing

Before: Magruder, Hamley and Merrill, Circuit Judges.

It is Ordered that the opinion filed herein on April 27, 1960, be amended in the following respects, all references being to the printed slip opinion:

The fourth paragraph on page 9 is amended to read as follows:

> "The precise question, then, is whether the asserted independent evidence to which the Olson Company refers establishes without dispute facts so inconsistent with the oral testimony which the trial court has credited that we ought to override findings of fact based upon such oral testimony."

The last paragraph on page 10 is amended by deleting the last sentence thereof and attaching footnote reference 11 at the end of the next preceding sentence.

Footnote 11 on pages 10 and 11 is amended to read as follows:

"11. Kittinger testified:

"'I took a bearing at 2:04 and had him bearing five degrees on my starboard bow, which would be 158 true, six miles distance.

* * * * * * *

"'Q. (By Mr. Harrison): And for those reasons you say——A. at 0204 I had the Olson at six miles; the Leopard was just forward of my beam.

* * * * * * *

"'Q. Now, at 2:04 was the only time that you took a plot on the Howard Olson? A. That is correct. An actual bearing and distance. Q. In taking that plot you reached the conclusion that she was five degrees on your starboard bow and about six miles away from you? A. Well, that was fact. I mean that was from the radar indication. Q. That you accept? A. That I accept, yes, sir.'"

The first paragraph on page 12 is amended to read as follows:

"Kittinger, however, did not testify that his computation was absolutely accurate. In order to project the Waterman's course back from the 2:16 Point Sur bearing to 2:04, Kittinger had to ascertain the distance covered over the Waterman's 153-degree course between 2:04 and 2:16. He did this by applying his estimate of the Waterman's speed to the time interval between 2:04 and 2:16."

The fourth paragraph on page 12 is amended to read as follows:

"We think enough has been said to indicate that the independent evidence on which the Olson Company relies, considered alone, leaves substantial doubt as to the actual position of the Olson at 2:04."

The third full paragraph on page 14 is amended to read as follows:

> "We do not undertake to say that any particular area of uncertainty discussed above necessarily deprives the Olson Company's independent evidence of high probative value. We do conclude that enough uncertainty is connected with these five items so that it may not fairly be said that they were undisputed or that such items render extremely doubtful the credibility of the oral testimony relied upon by the trial court. Therefore, the independent evidence upon which the Olson Company relies does not, in our opinion, warrant disregard of the trial court's appraisal of witness credibility."

It is Further Ordered that the petition for rehearing herein be and the same hereby is denied.

Dated June 8, 1960.

s/ Calvert Magruder
Circuit Judge

s/ Frederick G. Hamley
Circuit Judge

s/ Charles M. Merrill
Circuit Judge

[Endorsed] Filed June 8, 1960
Frank H. Schmid, Clerk

AMENDED OPINION OF COURT OF APPEALS

United States Court of Appeals
for the Ninth Circuit

Oliver J. Olson & Co., a corporation, *Appellant*, vs. Luckenbach Steamship Company, a corporation, *Appellee*.	No. 15,766 April 27, 1960
Marine Leopard Cargo, *Appellant*, vs. Oliver J. Olson & Co., a corporation, et al., *Appellees*.	

Appeals from the United States District Court for
the Northern District of California
Southern Division

OPINION

Before: Magruder, Hamley, and Merrill, Circuit Judges

HAMLEY, Circuit Judge:

This is an admiralty case involving a collision at sea between the SS Howard Olson and the SS Marine Leopard.

The Leopard is a C-4 freighter 622 feet 10 inches long with a beam of 71 feet 7 inches and 10,662.53 tons gross register. The Olson was a 261-foot lumber schooner of 2,477 gross tons. The Olson left San Pedro, California, in ballast, during the afternoon of May 12, 1956, northbound for Coos Bay, Oregon. The Leopard departed San Francisco on the morning of May 13, laden with 11,766 tons of cargo, bound down the coast to San Pedro.

In the early hours of May 14, 1956, the two vessels, proceeding in opposite directions, approached Point Sur off the California coast. The night was bright and clear, and visibility was unlimited. There was a northwest wind of force two or three, a northwesterly swell, and a moderate sea. Both vessels had the lights required of a steamer navigating at night, and they were properly positioned and burning brightly.

The vessels sighted each other's lights at approximately 1:40 a. m., when they were almost sixteen miles apart, and were in sight continuously thereafter until they collided. The speed of the Leopard was about seventeen knots and that of the Olson about eight knots. In the course of their approach the Leopard turned to the right and the Olson turned to the left. They collided at approximately 2:19 a. m. at a point from three and a half to four and a half miles off Point Sur.

The collision resulted in the sinking and total loss of the Olson, the death of four of its crew members and the injury of others, and damage to the Leopard and its cargo.

Oliver J. Olson & Co., owner of the Olson, filed a libel *in rem* and *in personam* against the Leopard and its owner, Luckenbach Steamship Company. Damages in the sum of $450,000 representing the market value of the Olson, $1,268.24 for loss of cash on board, $9,543.91 for loss of ship's inventory, and an unspecified sum for unascertained losses were sought. Luckenbach answered denying liability. Luckenbach also filed a libel *in personam* against Oliver J. Olson & Co. Damages in the approximate sum of $400,000 were sought as compensation for costs of repairs to the Leopard, expenses during detention, and loss of use and profit. The Olson Company answered denying liability.

Oliver J. Olson & Co., thereafter filed a petition for exoneration from or limitation of liability pursuant to 46 U.S.C.A secs. 181-189, inclusive. Answers to this petition asking that it be denied were filed by Luckenbach, various cargo claimants, and one personal injury claimant.

These actions were consolidated for trial on the issues of fault and limitation of the Olson Company's liability. After a trial the district court filed an opinion, reported in 152 F. Supp. 197, determining that the collision was caused by the mutual fault of personnel on the two vessels. The court further held that the owner of the Olson was entitled to limit its liability to an amount not exceeding the amount or value of its interest in the Olson and her freight then pending.

Findings of fact, conclusions of law, and an interlocutory decree consistent with the court's written opinion were thereupon entered. It was adjudicated that both vessels were at fault for the collision and that the owner of the Olson was entitled to limitation of liability. The court ordered that the damages thereby incurred be divided between the shipowners in accordance with the law in admiralty cases of mutual fault. It was directed that the cases be referred to a United States Commissioner to take testimony and report to the court concerning matters of damage. All questions in respect to the division of damages and application of the statutes for limitation of liability were reserved for later decision.

Oliver J. Olson & Co. has appealed from that portion of the interlocutory decree wherein fault was attributed to the Olson, asserting that the collision was the sole fault of the Leopard.[1] Luckenbach has not appealed, and therefore

[1]Appeals from interlocutory decrees determining the rights and liabilities of the parties in admiralty cases are permitted under 28 U.S.C.A. sec. 1292(a)(3).

the faults of the Leopard are admitted and are not in issue on this appeal. Marine Leopard Cargo (Cargo), representing various claimants in the limitation of liability proceeding, has appealed from that portion of the decree wherein the liability of the Olson Company was limited.[2]

The Issue of the Olson's Fault

The trial court determined that the Olson was at fault in two particulars: (1) in attempting to pass the Leopard starboard to starboard; and (2) in maintaining her course and speed when there was risk of collision and failing to take positive and proper action in ample time to avoid collision and the risk of collision.[3]

The Olson Company contends that its vessel was not at fault in either of these particulars, and that the trial court erred in holding otherwise.

The first of these asserted faults (attempting to pass the Leopard starboard to starboard) brings into question the applicability of Article 18 of the International Rules for

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[2]The cargo so represented was all carried aboard the Leopard. The Olson was in ballast and had no cargo. By reason of the contractual arrangement between the Leopard and its cargo and of the provisions of the Carriage of Goods by Sea Act, 46 U.S.C.A. secs. 1300 et seq., the Leopard is not liable to its own cargo for damage caused by negligence in the navigation or management of the Leopard. The Leopard cargo may, however, recover damages from the Olson Company if that company's liability is not limited pursuant to 46 U.S.C.A. sec. 183, and if the Olson as well as the Leopard is held to be at fault. Thus, on this appeal Cargo not only attacks the provision of the decree limiting the Olson Company's liability, but joins Luckenbach in defending the provision of that decree holding the Olson as well as the Leopard to be at fault.

[3]The trial court determined that the Leopard was at fault in failing to sound whistle signals on her course changes and in making piecemeal changes instead of one or more definite, substantial course changes. As above noted, this determination is not here in question.

Preventing Collisions at Sea, 33 U.S.C.A. sec. 146b(a). Under this rule, when two power-driven vessels are meeting end on, or nearly end on, so as to involve the risk of collision, each shall alter her course to starboard so that each may pass on the port side of the other.

Article 18 provides that vessels are deemed to be meeting end on, or nearly so, at night only if each vessel is in such a position as to see both the sidelights of the other ahead.[4] As further indicated in this rule, an alteration of course is not required at night in cases where the red light of one vessel is opposed to the red light of the other ahead, for then they will safely pass port to port, and they must so pass. Nor is an alteration of course required where the green light of one vessel is opposed to the green light of the other, for then they will safely pass starboard to starboard, and they must so pass.

As the Leopard approached the Olson she made several course changes to the Leopard's starboard and endeavored to pass the Olson port to port. As the Olson approached the Leopard she made no course changes until the risk of collision became imminent. She then made a course change to her port and endeavored to pass the Leopard starboard to starboard.

Therefore, with regard to the asserted fault of the Olson in attempting to pass the Leopard starboard to starboard, the critical question of fact is whether the Olson saw or should have seen the red light or the red and green lights of the Leopard ahead. If she saw or should have seen the Leopard's red light ahead, the Olson should not have at-

[4]The reference in this rule to "sidelights" is to the green sidelight which must be carried on the starboard side and the red sidelight which must be carried on the port side of each vessel. See Article 2, International Rules for Navigation at Sea, 33 U.S.C.A. sec. 145(a)(iv)(v) and (vi).

tempted a starboard-to-starboard passing. She should have continued her course and passed port to port. If she saw or should have seen in the Leopard's red and green lights ahead, she should have altered her course to starboard and passed port to port.

The trial court resolved this question of fact in favor of the Leopard. Specifically, the court found that the vessels were situated end on or nearly so within the meaning of Article 18, and each was therefore required to alter course to the starboard and pass port to port. Implicit in the finding that the vessels approached end on is the further finding that as the vessels approached each other each saw or should have seen both the red and green sidelights of the other ahead.

The Olson Company challenges this finding of fact, arguing that the evidence required a finding that the Olson saw only the green sidelight of the Leopard ahead. The Olson Company also contends that the trial court erred in excluding opinion testimony bearing upon the question as to which side of the Leopard the Olson should have passed.

This second contention will be dealt with first. The testimony which was excluded was a portion of that of Kenneth E. Kittinger. As second mate of the freighter John B. Waterman which was proceeding south shoreward of the Leopard, he had witnessed the approach of the Olson and the collision of the two vessels. Testifying by deposition, Kittinger described the postions of the Leopard and Olson as he had observed them. He stated that it had appeared to him that the Leopard and Olson were meeting on opposing courses and that the Leopard was slightly to the eastward, "which would make it apparent to me that there would be a starboard-to-starboard passing."

Two questions were then asked of Kittinger designed to elicit his expert opinion as to what alteration of courses the vessels should have made to effectuate a safe passage, and what the circumstances called for with respect to "the duties and obligations" of the Olson and Leopard.[5] The first such question was objected to, and the objection was sustained, on the ground that Kittinger did not know the courses of the Leopard and Olson and therefore could not possibly determine what course alterations they should have made.

The second of these questions was objected to on the same ground and on the further ground that the question called for a conclusion of law which was for determination by the trial court. The objection to the second question was sustained upon this second ground.

Persons of nautical skill and experience are usually permitted to express an expert opinion with regard to any disputed question of navigation not controlled by statutory rules of navigation. The City of Washington, 92 U.S. 31, 39.[6]

Here, however, except for the possible existence of a "special circumstance," to be discussed below, the side of

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[5]The two questions were:

"Q. At the time that you made the observation that it appeared that it would be a starboard-to-starboard passing, can you tell, Mr. Kittinger, in your opinion and from your observation and from your experience of 12 years as a watch officer, what direction you believe the vessels should have changed course to widen the distance between their projected courses, if necessary, and effectuate a safe passage?"

"Q. Taking the position that you have plotted for the Olson and for the Leopard at 0204 and considering that all you have is merely the opportunity of seeing what you saw on the radar scope, what did that situation indicate to your mind with respect to the duties and obligations of those two ships?"

[6]As stated in Griffin on Collision, sec. 274, page 631 (1949): ". . . such evidence is clearly admissible on questions of the usages of navigation, arising outside the scope of the statutory rules . . . ."

passing and the course changes, if any, which the Leopard and Olson should have made were prescribed by Article 18, depending upon what sidelights each vessel saw. It follows that unless the "special circumstance" rule applied there was no room for an expression of opinion of Kittinger as to course alterations which should have been made, or the duties and obligations of the Olson and Leopard in this meeting situation.[7]

A departure from the rules for navigation, including Article 18, may be necessary under special circumstances in order to avoid immediate danger. Article 27, International Rules for Navigation at Sea, 33 U.S.C.A. sec. 146k. Kittinger testified that in his opinion a special circumstance confronted the Olson, consisting of the presence of the Waterman to the port of the Leopard.[8] Because of this circumstance, Kittinger stated, he would not have considered passing between the Leopard and the Waterman in order to pass to the Leopard's port, if he had been navigating the Olson. Nor would he, Kittinger testified, have

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[7]Kittinger could, of course, testify as to any facts or express an expert opinion based on his observations as to what sidelights the Olson and Leopard saw or should have seen. Kanatser v. Chrysler Corp., 10 Cir., 199 F.2d 610, 618. He did testify that not being on either the Leopard or Olson he would not be able to say what lights of the other either of them would see. He also testified that while the Leopard and Waterman were on apparently parallel courses he had no knowledge of the actual courses of the Leopard and Olson. Kittinger further testified that the Olson seemed to him to be somewhat westward of the Leopard, and gave other testimony from which conclusions could be drawn as to the relative positions of the two vessels.

[8]The Leopard and the Waterman were proceeding along roughly parallel courses down the coast, with the Leopard seaward of the Waterman. When the Leopard overtook the Waterman about nineteen minutes before the collision the two vessels were a half mile apart. At the time of the collision there was between three quarters of a mile and a mile of water between the Waterman and the other two vessels.

considered crossing in front of the Waterman for the purpose of passing to the port of both southbound vessels.

It may be that a like expression of opinion was sought in asking the two questions concerning which objections were made and sustained. If so, such expressions would have been cumulative and their exclusion was not prejudicial.

Apart from this, however, it would appear that the Olson Company is in no position to rely on the special circumstance rule. The invoking of that rule here presupposes that except for such circumstances a port-to-port passing pursuant to Article 18 would have been required. In that event the Olson would have been obliged, upon perceiving the circumstance, to alter course to its port so as to pass starboard to starboard.

The Olson, however, made no course change until the risk of collision became imminent. It is therefore clear that Second Mate Felix Zinkiewicz, who was on the bridge of the Olson at the time, did not consider that he was faced with a special circumstance warranting departure from article 18.[3] He was simply proceeding on the basis that he was green to green with the Leopard and therefore would pass safely starboard to starboard without altering course.

Matters pertaining to the examination of expert witnesses rest largely within the discretion of the trial court. Andersen v. United States, 9 Cir., 237 F.2d 118, 125. For the reasons stated above we hold that the trial court did not abuse its discretion in sustaining the objections to the questions propounded to Kittinger.

This brings us to the Olson Company's principal contention on this branch of the case, that is, its challenge to the

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[3]He testified, in fact, that there was enough room between the Waterman and the Leopard "to get a battleship or an aircraft carrier in there, and then some."

finding of fact that as the vessels approached each other they each saw or should have seen both sidelights of the other.

The testimony of personnel on the two vessels which collided was in sharp dispute on most points pertinent to this finding of fact. They disagreed as to the positions of the two vessels at various times, the courses and course changes, and the running lights which could or could not be seen.[10] This conflict in the testimony is discussed at considerable length in the opinion filed by the trial court and need not be repeated here.

Observing that the two versions of the facts are irreconcilable, the trial court stated that it found the Leopard's witnesses more credible. The court therefore accepted their version. In its opinion the trial court discussed some of the factors which influenced it in placing credit in the Leopard's witnesses. The Olson Company questions some or all of the reasons so discussed, but we do not find these arguments of appellant convincing.

That company, however, places chief reliance upon the contention that its case is not dependent upon the credibility of any witness with respect to any point which is contradicted. What is meant by this, apparently, is that if all of the conflicting testimony of personnel on the Olson and Leopard concerning the factors noted above is disre-

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[10]For example, as to the sidelights which were visible, the captain and third mate of the Leopard testified that they saw both the red and green sidelights of the Olson indicating an end-to-end approach and a port-to-port passing. The second mate and two seamen on the Olson, on the other hand, testified that until her last-minute starboard swing they saw only the green light of the Leopard indicating a starboard-to-starboard passing. One of the Olson's seamen, however, testified that he "momentarily" saw the Leopard's red light. The Olson Company accounts for this as due to yawing of the Leopard. Kittinger's testimony bearing upon this point was inconclusive.

garded, there is other independent evidence not involving the matter of credibility which requires that the findings of fact be set aside.

As in the case of appeals governed by Rule 52(a), Federal Rules of Civil Procedure, 28 U.S.C.A., findings of fact entered by the trial court in an admiralty case are not to be set aside unless clearly erroneous. McAllister v. United States, 348 U. S. 19, 20. This being true, it would appear that there should also be applied in admiralty cases the caution recited in Rule 52(a) that "due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." If, however, as appellant contends, some undisputed fact or facts render the credibility of the oral testimony extremely doubtful, the findings of the trial court, though predicated upon the credibility of witnesses, may be held to be erroneous. Arnolt Corp. v. Stansen Corp., 7 Cir., 189 F.2d 5, 10.

The precise question, then, is whether the asserted independent evidence to which the Olson Company refers establishes without dispute facts so inconsistent with the oral testimony which the trial court has credited that we ought to override findings of fact based upon such oral testimony.

The independent evidence to which the Olson Company refers consists of five items: (1) The position of the Olson at 2:04 a. m., as testified to by the witness Kittinger; (2) the postion of the Leopard at 2:04 a. m., as testified to by Kittinger; (3) the track of the Leopard, as indicated by her own course recorder; (4) the point of collision, as determined by the place where the Leopard was at 2:19 a. m.; and (5) the track of the Olson from 2:04 a. m. until a few minutes before the collision, based upon testimony concerning the Olson's course given by persons who were aboard the Olson and the asserted physical fact that the track contended for by the Olson Company was the only

course that could get the Olson from her 2:04 a. m. position to the point of collision in the time allotted.

It is argued that these five items of evidence prove that the approach of the vessels was green to green, starboard to starboard. A chart attached to the Olson Company's brief, purporting to translate this independent evidence into positions and courses, shows the two vessels approaching green to green with a safe starboard-to-starboard passing indicated except for the Leopard's course changes to her starboard during the last few minutes preceding the collision.

These items of evidence unquestionably have great probative value. However, the issue here is not what weight the trial court could have given these items of evidence, but whether the court was required to give them controlling effect over the other evidence.

The 2:04 a.m. position of the Olson, as assertedly established by the independent evidence, was based partly on a radar bearing on the Olson made by Kittinger, who was on the Waterman at that time. It also involved a determination as to the Waterman's position at that time arrived at in a manner to be described. The Olson Company asserts that the radar bearing showed that the Olson was "exactly" five degrees off the Waterman's starboard bow and "exactly" six miles away. Kittinger, however, did not testify that this bearing and distance were exact.[11]

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[11] Kittinger testified:

"I took a bearing at 2:04 and had him bearing five degrees on my starboard bow, which would be 158 true, six miles distance.

. . . . . .

"Q. (By Mr. Harrison): And for those reasons you say ——A. at 0204 I had the Olson at six miles; the Leopard was just forward of my beam.

. . . . . .

"Q. Now, at 2:04 was the only time that you took a plot on the Howard Olson? A. That is correct. An actual bearing

Kittinger did not write down his 2:04 bearing on the Olson, but plotted it on his radarscope with a grease pencil which, he said, "is easily wiped off." It is debatable whether or not the limitations and inaccuracies to which radar is subject could have affected the reading which Kittinger obtained at 2:04.[12] There is also room for arguing that Kittinger's 2:04 radar bearing on the Olson is inconsistent with Zinkiewicz's testimony concerning the Olson's 320-degree course. Unless, as the Olson Company asserts and Luckenbach denies, the Olson experienced a westerly "set" as it proceeded up the coast, it could not have been at the point where Kittinger's 2:04 bearing showed it to be.

But, as indicated above, the determination of the Olson's position at 2:04 is based not alone on Kittinger's 2:04 radar bearing, but also upon a computation made by him in order to determine the position of the Waterman when he made that bearing. Kittinger made this computation by projecting the Waterman's course back from her radar-ascertained position abeam Point Sur 3.2 miles away at 2:16 while on a course of 153 degrees. The Olson Company asserts that this computation was made "with absolute accuracy" which "has never been questioned."

Kittinger, however, did not testify that his computation was absolutely accurate. In order to project the Waterman's course back from the 2:16 Point Sur bearing to 2:04, Kittinger had to ascertain the distance covered over the

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and distance. Q. In taking that plot you reached the conclusion that she was five degrees on your starboard bow and about six miles away from you? A. Well, that was fact. I mean that was from the radar indication. Q. That you accept? A. That I accept, yes, sir."

[12]For a discussion of some of the legal problems arising from possible technical inaccuracies, see 14 Proceedings of The Merchant Marine Council, United States Coast Guard 167, October 1957; Gilmore & Black, Admiralty, 423-424 (1957).

Waterman's 153-degree course between 2:04 and 2:16. He did this by applying his estimate of the Waterman's speed to the time interval between 2:04 and 2:16.

The estimate of speed was arrived at by dividing the distance traveled by the Waterman between 1:05 and 2:16 a. m. by the one hour and eleven minutes consumed between those two times. Kittinger "figured" the distance to be 18.75 miles and thereby arrived at a speed of "15.87." Kittinger testified that in making this computation he "made no allowance for that minor course change that I had at nine degrees."

By this process, which according to Kittinger required "dead reckoning," a distance of 3.17 miles between the Waterman's 2:04 and 2:16 positions was arrived at. Kittinger then projected the Waterman's course back 3.17 miles over the course of 153 degrees and thus arrived at the Waterman's 2:04 position. It was on the basis of the Waterman's position so determined and Kittinger's 2:04 radarscope reading of the Olson that the latter's 2:04 position was ascertained.

We think enough has been said to indicate that the independent evidence on which the Olson Company relies, considered alone, leaves substantial doubt as to the actual position of the Olson at 2:04.

The same conclusion is required with regard to the Olson Company's independent evidence as to the Leopard's position at 2:04. That company states in its brief that Kittinger located the Leopard at 2:04 on his radar screen and plotted it in relation to the "known" location of his own vessel. The "known" location of the Waterman at 2:04 was arrived at in the manner described above and accordingly was not established beyond dispute.

The evidence also indicates that while Kittinger observed the Leopard on his radar when she was abeam at 2:00 a. m. he made only a visual observation at the critical time of 2:04. Kittinger did not determine the exact distance between the Waferman and Leopard at 2:04. On the basis of his radar observation at 2:00 he estimated that at 2:04 the Leopard was just outside the 5 10ths range, "possibly 6 10ths" of a mile away. When asked to place on a chart the approximate position of the Leopard at 2:04, Kittinger testified: "It would only be an approximation."[13]

The third item of the Olson Company's independent evidence relates to the track of the Leopard as indicated by her own course recorder. However accurate and reliable the course recorder was, there would still inhere in the track so ascertained any error resulting from an inaccurate positioning of the Leopard at 2:04. Some uncertainty in connection with this item of evidence also arises from the dispute between the parties as to the time differential between the course recorder and the clock on the Leopard's bridge. An additional uncertainty is occasioned by the fact testified to at the trial, that a ship turning in the water is not like a locomotive on tracks, but tends to skid sideways through the water before settling on her new course.

The fourth item of evidence has to do with the point of collision. The Olson Company's independent evidence locates this point at the place where the Leopard's forward movement ceased when it came into collision with the Olson at 2:19. But it is plain that any uncertainties found to exist in connection with determining the Leopard's position at 2:04 and her track thereafter, as discussed above, would be reflected in this way of ascertaining the Leopard's position

[13] It should be noted that for purposes of arguing another point Luckenbach indicated that it would "assume" the accuracy of the position of the Leopard at 2:04.

at 2:19. Moreover, a new uncertainty is interjected at this point due to the inability to accurately determine how much forward movement the Leopard experienced after it came into collision with the Olson.

The fifth and final item of independent evidence upon which the Olson Company relies relates to the track of the Olson from 2:04 to the point of collision.

The Olson Company asserts that the Olson's track after 2:04 can be determined in either one of two ways. One of these is to simply draw a line from her 2:04 position to the point of collision. The Olson Company argues that considering the Olson's maximum speed the line so drawn, as depicted on the chart attached to its brief, is the only course that could get the Olson from her 2:04 position to the point of collision in the time allotted.

Assuming this to be true, there would still inhere in such determination any error which may have occurred in fixing the Olson's position at 2:04 and the point of collision at 2:19. The possibility of errors in fixing these positions has been discussed above.

The Olson Company also argues that the track of its vessel after 2:04 can be definitely ascertained by plotting her course which, according to the testimony of all on board the Olson, was 320 degrees until a few minutes before the collision. The beginning position of a track so plotted would be affected by any error Kittinger may have made in fixing the Olson's position at 2:04. Moreover, the asserted 320 degree course of the Olson at 2:04 was in serious dispute. The resolution of that dispute called for a determination of what westerly set, if any, the Olson experienced before and after 2:04.

We do not undertake to say that any particular area of uncertainty discussed above necessarily deprives the Olson

Company's independent evidence of high probative value. We do conclude that enough uncertainty is connected with these five items so that it may not fairly be said that they were undisputed or that such items render extremely doubtful the credibility of the oral testimony relied upon by the trial court. Therefore, the independent evidence upon which the Olson Company relies does not, in our opinion, warrant disregard of the trial court's appraisal of witness credibility.

We conclude that the finding of fact that as the Olson and Leopard approached each other they saw or should have seen both the sidelights of the other is not clearly erroneous. Such finding being sustained, it follows that the Olson was at fault in attempting a starboard-to-starboard passing, no special circumstance existing which warranted such passing. It is unnecessary to decide whether the trial court erred in holding that the Olson was also at fault in other respects.

The Issue of Limitation of Liability

As before stated, Cargo, representing the owners of cargo aboard the Leopard, has appealed from that portion of the interlocutory decree wherein the liability of the Olson Company was limited. Provision for such limitation of liability is contained in 46 U.S.C.A. sec. 183, paragraphs (a) and (e) of which are quoted in the margin.[14]

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[14] (a) The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not, except in the cases provided for in subsection (b) of this section, exceed the amount or value of the

Findings of fact pertinent to the issue of limitation of liability were entered by the trial court after it had filed a written opinion. The court found that the master and crew of the Olson were properly licensed and competent to perform their duties; that there was no unseaworthiness of the Olson which contributed or could have contributed to the collision; that there were no owners or managing agents of the Olson aboard the Olson at the time of the collision; that only cause of collision attributable to the Olson was the negligent navigation of the mate on watch; and that the acts or omissions of the mate were done without the privity or knowledge of the master or managing agents or owners of the Olson.

Cargo contends that the trial court erred in making these findings of fact, except the finding that the master and crew were properly licensed. Entry of these findings was error, Cargo asserts, because there was no evidence to support them.

With regard to this limitation issue, the fault of the Olson in all respects found by the trial court is to be taken for granted. Petition of United States, The F.S. 231, 178 F.2d 243, 252. The owner of the Olson also has the burden of proving that the acts or omissions by reason of which the Olson was found to be at fault were done, occasioned, or incurred without the owner's privity or knowledge. States Steamship Co. v. United States, on petition for rehearing and on petition for rehearing on limitation, 9 Cir., 259 F.2d 458, 464, 474. With respect to loss of life or bodily injury

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interest of such owner in such vessel, and her freight then pending."

"(e) In respect of loss of life or bodily injury the privity or knowledge of the master of a seagoing vessel or of the superintendent or managing agent of the owner thereof, at or prior to the commencement of each voyage, shall be deemed conclusively the privity or knowledge of the owner of such vessel."

the privity or knowledge of the master of the Olson at or prior to the commencement of the voyage, if any, is conclusively deemed the privity or knowledge of the owner. 46 U.S.C.A. sec. 183(e).

In our opinion there was ample evidence to sustain each of the questioned findings except the finding that no owners or managing agents of the Olson were aboard at the time of the collision. The general evidence bearing upon the way in which the collision occurred was sufficient to support the finding that it was not caused by unseaworthiness of the vessel. The same evidence and the additional evidence that the master and crew were duly licensed were sufficient to support the finding that the collision was caused by negligent navigation at the time, but not to incompetence of the master and crew.

It is recognized, of course, that there was considerable evidence tending to show that the second mate who was in charge at the time of the collision was not competent to navigate the Olson under the conditions then existing. Likewise, there was some evidence tending to show that the vessel may not have been seaworthy in some particulars. But it was for the trial court to evaluate this evidence along with all the other evidence in the case. The question is not whether there was some evidence tending to show unseaworthiness and incompetency, but whether such evidence is so overwhelming that a finding to the contrary would be clearly erroneous. We hold that it is not.

These findings as to causation being sustained, the owner's burden of proving that the acts causing the collision were done, occasioned, or incurred without the owner's or master's privity or knowledge became relatively light. Negligence on the bridge, unconnected with general incompetency or unseaworthiness, could not be attributed to an

owner who was ashore or to an owner or master who was on board but not on the bridge at the time. It was definitely established that neither the owner nor the master was on the bridge.[15]

It follows that the owner sustained the burden of proof placed upon him by section 183(a) and (e), and that the questioned findings are not clearly erroneous.

The interlocutory decree is affirmed both on the issue of fault and on the issue of liability.

(Endorsed) Opinion Filed April 27, 1960, as amended by order of June 8, 1960.

Frank H. Schmid, Clerk.

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[15]It is therefore immaterial whether the owner was aboard. Hence the finding that he was not, although not supported by evidence, was not prejudicial.

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JAMES R. BROWNING, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 371

[illegible] & Olsen Corporation,
Petitioner,
vs.
[illegible] Steamship Company, a corporation, Matson [illegible] Company, et al.,
Respondents.

Brief of Luckenbach Steamship Company in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

[illegible]

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In the Supreme Court of the United States

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OLIVER J. OLSON & CO., a corporation,
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vs.

LUCKENBACH STEAMSHIP COMPANY, a corporation, MARINE LEOPARD CARGO, et al.,
Respondents.

Brief of Luckenbach Steamship Company in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

I.

STATEMENT

On May 15, 1956, the *Marine Leopard*, proceeding south at 17 knots along the California coast, collided near Point Sur with the northbound *Howard Olson*, which was traveling at 8 knots. The night was fine and clear and the lights of each ship had been visible to the other for half an hour. The *Marine Leopard*, having observed both sidelights of the *Howard Olson*, altered course to the right nonconformity with the International Rules for Navigation at Sea relating

to meeting vessels (33 U.S.C. § 146b(a)). The *Howard Olson*, in addition to other errors, altered course to the left and the vessels collided at 0218 or 0219. The track of the *Marine Leopard* was recorded on her course recorder. The interpretation of the course recorder tape was a matter in dispute. The track of the *Howard Olson* is in doubt, since the testimony of her own witnesses on this point is in conflict (see Appendix).

II.

QUESTIONS PRESENTED

This case involves only a narrow issue of fact concerning the tracks of the vessels as they approached the collision. It does not present any important question of law justifying review by this court. Petitioner is a disappointed litigant seeking review of a factual issue of concern to no one but the parties to this particular case. As stated in *Grower Manufacturing Co. v. Leader Co.*, 336 U.S. 271, 275; *Jost v. Chambers*, 312 U.S. 383, 385, the United States Supreme Court is not "a court for correction of errors in fact finding".

III.

ARGUMENT

A. The Basis for the Petition.

Petitioner does not quarrel with the fact that the officers and crew of the *Marine Leopard* gave testimony in sharp conflict with that of the officers and crew of the *Howard Olson*. Further, petitioner concedes, as it must, the function of the district judge in evaluating the credibility of these witnesses.

The petition is based on two claims:

(1) That the *Marine Leopard* version of the collision was impossible;

(2) That uncontradicted evidence from independent sources corroborated the *Howard Olsen*'s version.

On the basis of these two claims petitioner asserts that the "overwhelming preponderance" (Petition, p. 12) of the evidence favored its version. Petitioner further asserts that the Court of Appeals ignored this overwhelming preponderance of evidence and erroneously sustained the District Court's decision merely because the *Howard Olsen*'s version was not "clothed with mathematical certainty" (Petition, p. 13). Petitioner's claims and assertions do not bear comparison with the record.

B. The "Physical Impossibility" of the Marine Leopard's Claims.

Without attempting to explain why, petitioner states that this collision could not have occurred had the vessels been on meeting courses (Petition, p. 8). This is not true. A detailed diagram was prepared by a naval architect who was fully familiar with the speeds, drafts and maneuvering characteristics of each vessel and was introduced into evidence as Luckenbach's Exhibit No. 20 (Record p. 924). This diagram demonstrates clearly that the collision not only could have happened as Luckenbach claims, but probably did.

C. The "Undisputed" Evidence Corroborating the Howard Olsen's Version.

Petitioner attached to its petition a chart, purportedly showing "the tracks of the two vessels, prepared from uncontradicted evidence". This same chart was urged upon the trial court and the Court of Appeals. It is based on portions of testimony selected out of context and a distorted interpretation of the *Marine Leopard*'s course to

corder.[1] This is most easily demonstrated by the following chart, which illustrates the various tracks of the *Howard Olson* which result from a diagramatic presentation of the differing testimony of Olson's various witnesses. A glance at this chart shows that, even disregarding Luckenbach's evidence, there is no certainty whatever as to the track of the *Howard Olson* as she approached the collision.

Luckenbach has never conceded that the *Howard Olson* was on base course 320° true and has never conceded the accuracy of Kittinger's 0204 positioning of the *Howard Olson*, which was not recorded but was merely a matter of memory (or his 0155 position, or his collision position, for that matter). However, it is interesting to note that Kittinger's *entire* testimony confirms a meeting situation and contradicts Olson's version of the collision.[2]

D. The Court of Appeals Reaction to the Evidence Relied upon by Petitioner.

There is no valid basis or merit in petitioner's claim that the Luckenbach version of this collision was physically impossible.[3] Nor is there any basis for labeling the testimony

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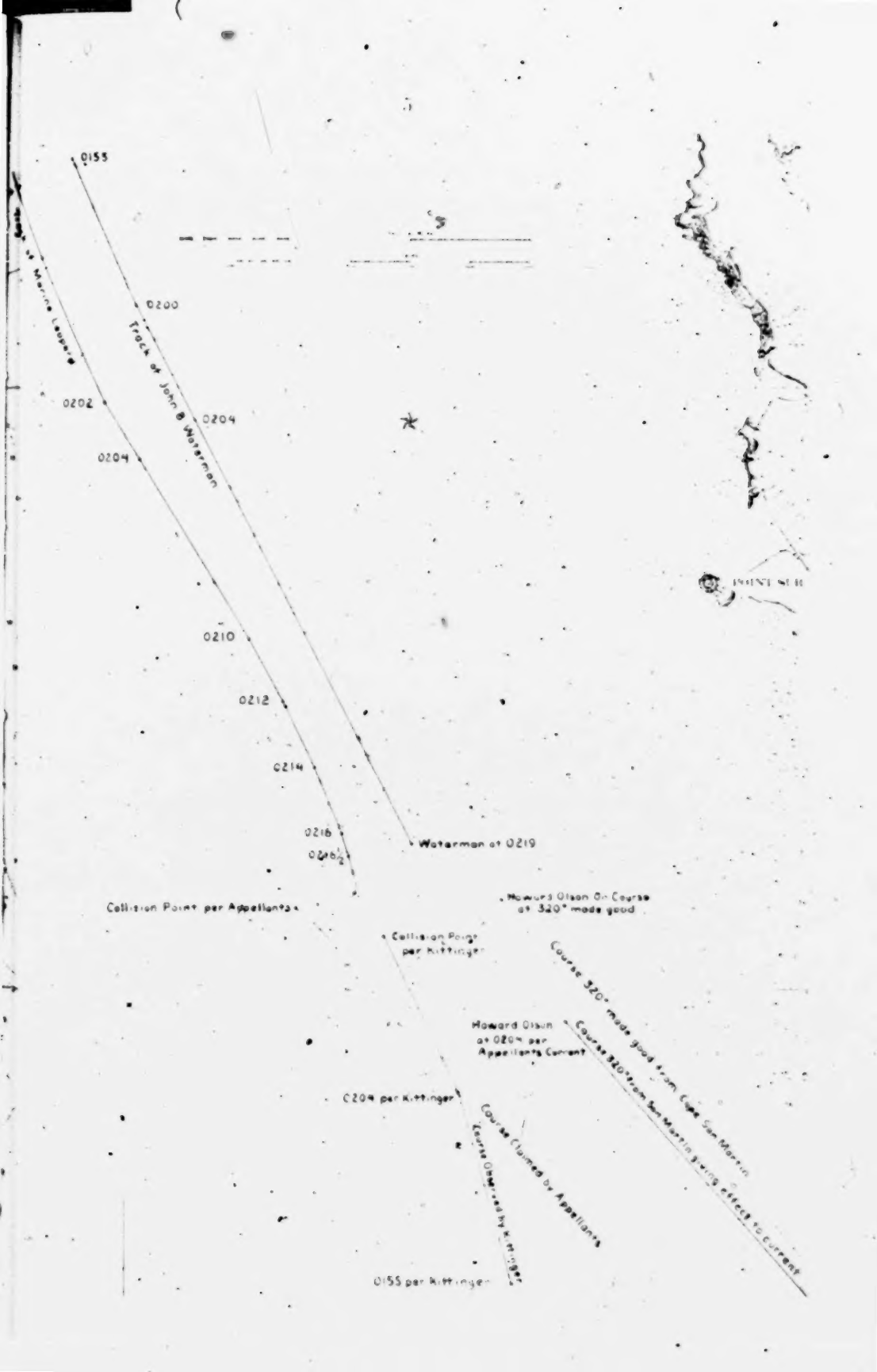
1. Petitioner concedes that respondents "interpret the course recorder slightly differently." This is an admission that there was a dispute of fact on this subject.

2. Kittinger observed the range and bearing of the *Howard Olson* at three times: 0155, 0204 and at collision (see Appendix). A line connecting these three points is labeled "course observed by Kittinger" on the accompanying chart.

3. For instance, if on the accompanying chart the "course claimed by appellants" is moved to the east approximately one half mile, so that the "collision point per appellants" coincides with the terminal point of collision shown on the "track of the *Marine Leopard*", a perfectly possible and plausible picture of the collision on meeting courses results.

Petitioner has also stated:

"* * * if the *Olson* at 0210 were * * * showing both red and


0155
0200
Track of John B Waterman
0202
0204
0204
0210
0212
0214
0216
0216½
Waterman at 0219
Howard Olsen On Course at 320° made good
Collision Point per Appellants
Collision Point per Kittinger
Howard Olsen at 0204 per Appellants Current
Course 320° made good from Cape San Martin
Course 320° from San Martin giving effect to Current
0209 per Kittinger
Course Claimed by Appellants
Course Observed by Kittinger
0155 per Kittinger

of the *Waterman* mate, Kittinger, as uncontradicted or undisputed. Kittinger's testimony was vigorously disputed and shown to be unreliable. So, also, did Luckenbach dispute and successfully disprove petitioner's interpretation of the *Marine Leopard's* course recorder. Thus, not only was there no "overwhelming preponderance" of evidence in favor of petitioner's claims, the balance was in favor of Luckenbach's version of the collision.[4]

The Court of Appeals opinion listed the five items of evidence upon which Olson's version of the collision was based. As to these five items the Court of Appeals said:

> "These items of evidence unquestionably have great probative value. However, the issue here is not what weight the trial court could have given these items of evidence, but whether the court was required to give them controlling effect over the other evidence."

The court then went on to list only some of the reasons why each of these five items of evidence was subject to

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green to the *Leopard*, and thereafter only red * * * a collision would have been physically impossible."

The simplest refutation of this statement is also the most obvious explanation of the confusion and inconsistency in Zinkiewicz's testimony. If instead of maintaining an undeviating course of 320° until moments before the collision (there is no finding of fact that she did) the *Howard Olson* altered her course in indecision, she would have shown all combinations of lights at different times. Further, even if she were on course 320°, imperfect helmsmanship, yawing and inevitable imperfections in sidelight screening would cause both her lights to be disclosed. See Farwell, The Rules of the Nautical Road, 1941 Ed. & 2d Ed., p. 144, as to sidelight screening.

4. The petition repeatedly refers to the "admitted" faults of the *Marine Leopard*. At no time has respondent admitted the faults of the *Marine Leopard*. Such fault was initially denied in the pleadings and vigorously denied and contested in the trial court. The fact that the District Court's finding fault was not appealed does not amount to an admission of fault. *The Mohawk*, 242 F. 845 (2nd Cir. 1917). See also *Federal v. South American Shipping Corp.*, 159 F. 2d 795, 797 (2nd Cir. 1947).

disbelief. The court concluded its discussion of the weaknesses embodied in this evidence with the comment:

> "* * * the independent evidence upon which the Olson Company relies does not, in our opinion, warrant disregard of the trial court's appraisal of witness credibility."

While the Court of Appeals may have been guilty of understating the contradictory character and unreliable nature of Olson's evidence it was certainly not guilty of applying an improper standard of review.

E. The Standard of Review Employed by the Court of Appeals.

The standard of review applicable to this case was clearly set forth in *McAllister v. U. S.*, 348 U.S. 19 (1954), where this court stated:

> "In reviewing a judgment of a trial court, sitting without a jury in admiralty, the Court of Appeals may not set aside the judgment below unless it is clearly erroneous. * * *. A finding is clearly erroneous when 'although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed' * * *." (Citing *United States v. United States Gypsum Co.*, 333 U.S. 364 (1948) now relied upon by petitioner.)

The Court of Appeals expressly referred to and adopted the standard set forth in *McAllister v. U. S.*, *supra*. Having thus established its standard of review, the Court of Appeals reviewed the five items of evidence which Olson contended required reversal of the trial court's findings and concluded that:

> "* * * enough uncertainty is connected with these five items so that it may not fairly be said * * * that such items render extremely doubtful the credibility of the oral testimony relied upon by the trial court. There

fore, the independent evidence upon which the Olson Company relies does not, in our opinion, warrant disregard of the trial court's appraisal of witness credibility."

Any reasonable person reading the Court of Appeals' criticism of the evidence relied upon by Olson can be left with no doubt that the Court of Appeals concluded the trial court's findings were not clearly erroneous and certainly had no conviction that a mistake had been committed.

5 The Court of Appeals did not find it necessary to consider the further fault of the *Howard-Olson* in failing to take timely action to avoid the collision. This fault was clear and flagrant. The trial court so held (see Findings IX and XI, Record, pp. 111 and 129). By testimony of her own witnesses, the *Olson* failed to take any action to avoid the collision until one to one and one half minutes before the vessels collided (Record, p. 112). She was proceeding full speed in clear weather and had the *Luckenbach* in sight continuously for over 16 miles (Record, p. 112).

IV.

CONCLUSION

The Court of Appeals expressly adopted the standard of review set forth in *McAllister v. U.S.*, *supra*. The Court of Appeals having adopted this standard, applied it, and found that the trial court's findings were not clearly erroneous and, after reviewing the evidence relied upon by Olson for reversal, left no doubt that it was not of the conviction that a mistake had been committed.

The correct standard of review was properly applied. Accordingly, the petition should be denied.

Respectfully submitted,

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(Appendix Follows)

Appendix

The watch officer of a nearby vessel, Kenneth Kittinger, testified on behalf of the Olson Company. Kittinger's observations of the *Howard Olson* were made at three different times. At 0155, after the *Howard Olson* had been in view for sometime, he sighted down the starboard side of his mast (Record, p. 1092) and calculated that the *Howard Olson* was bearing 2° off his starboard bow at a distance of ten miles (Record, p. 1071). (The distance he obtained from radar.) At 0204 Kittinger glanced at his radarscope and estimated that the *Howard Olson* was bearing 5° off his starboard bow at a distance of six miles (Record, p. 980). He did not plot this radar observation or write it down. It is simply a matter of memory. Later, at the moment of the collision (0219 *Watermaa* time), he observed that the *Howard Olson* and the *Marine Leopard* were bearing 198° at a distance of three-quarters to one mile away (Record, pp. 1021, 1022).

These observations are inconsistent with appellant's claim that the *Howard Olson* was on course 320° true. For this reason appellant conveniently ignores the other two of Kittinger's observations and selects as "absolutely accurate" and "uncontradicted" the 0204 observation because it is the only one which lends any support to the *Olson*'s claim.

However, the 0204 observation is inconsistent with the *Olson*'s own testimony. The *Howard Olson*'s watch officer, Zinkiewicz, testified that the *Howard Olson* proceeded north on course 320° true from a 10 p.m. position three miles abeam Cape San Martin (Record, p. 174). Such a course would take the *Howard Olson* well inshore of the point where Kittinger placed her at 0204 — so far inshore, in fact,

that the Olson would have to approach the *Marine Leopard* port-to-port. Further, the *Howard Olson*'s master located the point of collision far inshore of where it would have had to occur if Kittinger's estimate were accurate (Record, p. 528).

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In the Supreme Court of the United States

No. 371

Brief of Respondent
Marine Leopard Cargo in Opposition

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In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 371

OLIVER J. OLSON & CO., a corporation,
Petitioner,

vs.

LUCKENBACH STEAMSHIP COMPANY, a corporation, MARINE LEOPARD CARGO, et al.,
Respondents.

Brief of Respondent Marine Leopard Cargo in Opposition

INTRODUCTORY STATEMENT

The *Howard Olson* and the *Marine Leopard*, both unencumbered steam-powered vessels, collided in the vast waters of the Pacific Ocean on a clear calm night after having had each other in sight continuously for 16 miles and over one-half hour. Both vessels navigated to a meeting situation. The *Leopard* turned right for a red to red or port to port passing. The *Olson* turned left at the last minute. Neither reduced speed. This left turn by the *Olson* was too little and too late in the opinion of the District

Court (Tr. 113) and also in violation of Rule 18 (33 U.S. Code 1408) which requires a right turn in a meeting situation. The Court of Appeals agreed that the left turn was in violation of Rule 18, and thus found it "unnecessary to decide whether the Trial Court erred in holding that the *Olson* was also at fault in other respects".[1]

QUESTIONS PRESENTED

The Petition under "Questions Presented", states that "the only evidence of fault on the part of petitioner's vessel was the testimony of *an* interested witness."[2] A reading of the District Court's opinion and findings will show that many witnesses and much evidence, including some of her own, cast the *Olson* of fault. Therefore the only question actually presented is whether this Court wants to review again the proceedings of eight days of trial wherein the principal navigating witnesses and most of the minor witnesses from both vessels testified in person. The District Court found the *Leopard's* witnesses more credible than those of petitioner (D.C. Opinion Tr. 107; D.C. Findings V, VII, Tr. 127, 128).

ARGUMENT

Both courts below have decided that petitioner's "impossibility" argument which it now presents to this Court is

1 The issue of the *Olson's* fault arose in three separate proceedings which were consolidated for trial and which are now consolidated on appeal: 1. the libel filed by Olson against Luckenbach, 2. the libel filed by Luckenbach against Olson, and 3. the petition for exoneration, from, or limitation of, liability filed by Olson.

2 This refers to the *Leopard's* master, Captain Snow. Actually the point made by the Petition relates solely to one position estimated by this witness which it is claimed is impossible. The argument is that both side lights could not have been seen "in the position testified to by Captain Snow" if the *Olson's* course of 320 (Petition, p. 6

neither sound nor dispositive of the case. Petitioner's chart at page 7 of the Petition is not evidence. It is the product of counsel's work and wishful thinking. It represents their version of the collision approach and the point of collision and nothing more. It was presented in argument to both courts, both of which recognized that movements on water cannot be reconstructed with such precision. There are no surveyor's markers on the ocean. The purported track of the *Olson* has nothing but the testimony of her navigator to support it. All her records were lost. All witnesses who estimated the point of collision, including the master and mate of the *Olson* (Tr. 527-8, *Olson* Exhibit 3) and Kittinger, the first officer of the SS John B. Waterman (the "bystander" vessel), (Tr. 1025-6, *Olson* Exhibit 4), differ materially from the position used in counsel's argument and chart. Both courts below preferred the evidence that contradicts counsel's chart; such as the testimony of the *Leopard* witnesses that both sidelights of the *Olson* were seen ahead, the admission of the *Olson*'s look-out that he saw the *Leopard*'s red light ahead before he went off watch 4 minutes before the collision (Tr. 107) and the testimony of the independent witness, Kittinger, watching from the third vessel in the area, that both vessels were at all times "marching right down together on the 180 line" (Tr. 1088), "head and head" (Tr. 1062-1064) on "substantially opposite courses" (Tr. 1086) which were "too close" (Tr. 1066-1067).[3] Such evidence was preferred over

3. Incidentally, this witness' testimony that the *Olson* range lights were open to him and widened off his bow referred to at the bottom of page 8 of the Petition is perfectly consistent with an end on approach between the *Leopard* and the *Olson*. This is so because the witness' vessel was positioned about a half mile inshore of both the *Leopard* and *Olson*. If Kittinger had moved over onto the *Leopard*, the *Olson*'s range lights would close directly ahead of him and maintain the constant bearing of the collision course. He testified that from his position they were only "slightly open" (Tr. 1080).

counsel's attempted reconstruction of the collision approach from selected bits of testimony of their choice.

Although petitioner characterizes its selected bits of testimony as "error-proof observations, by eye and radar" (Petition, p. 8), the Court of Appeals, as well as the District Court, was sophisticated enough to recognize that no such observations are error-proof to say nothing of the error-proofness of the witnesses' recollection. Petitioner attempts to fashion this self-evident circumstance into an "improper standard of review". Nothing so presumptuous is even involved.

This is *not* a case like *United States v. United States Gypsum Co.*, 333 U.S. 364, in which the testimony (to the effect that the various defendants had *not* acted in concert) which the trial judge purported to believe and which this court disregarded was in conflict with hundreds of documents which the witnesses themselves had prepared long before litigation and which clearly showed that the defendants had acted in concert.

Nor is it a case like *Russo v. United States* (2 Cir. 1955), 228 F.2d 317, in which the Court of Appeals refused to consider itself bound by testimony (which the trial court had purported to believe) to the effect that an electric winch had started by itself.

This is a case of a collision at sea involving conflicting testimony and estimates about time, places and distances, about the position of one vessel with respect to another, about what could be seen from one vessel when it was in a certain position and about when it was in that position. In other words, it clearly was a case which would best be decided by the trial judge who saw and heard all of the witnesses.

And the possibility that one of the witnesses whom the trial judge chose to believe in other respects may have made

one erroneous estimate as to the position of one of the vessels at one particular time does not invalidate the trial court's findings. Nor does it mean that the Court of Appeals applied an erroneous standard in reviewing those findings.

Petitioner's attempt (Petition, pp. 16-17) to use the major-minor fault rule[1] to create a presumption of innocence for its vessel has been fully considered below and rejected as not justified by the facts of this case (D.C. Opinion, Tr. 116, D.C. Finding XIV, Tr. 130). Although neither Court below found it necessary to rely on presumptions at all, we suggest that the only presumptions appropriate to this case would be those laid down in cases of steamship collisions occurring in clear weather with oceans of maneuvering room and ideal navigational conditions.

The Comus, 19 F.2d 774, 1927 A.M.C. 860, 863:

> "Where, on a clear night, two vessels see each other six or seven miles apart, and then come into collision on the wide ocean, there is a heavy burden upon each of them to explain their navigation in an endeavor to exonerate themselves from fault."

The Lucanstone, 87 Fed. 769, 772-773:

> "A collision so absolutely indefensible cannot easily be explained upon the theory that but one vessel was responsible * * *. No matter how gross the fault of one, an accident of this character could hardly have occurred without the concurring carelessness of the other."

Yang Tze Ins. Ass'n v. Furness, Withy & Co., 215 Fed. 569, 865:

> "Plain common sense constrains one to such a conclusion. To exonerate either of them under such condi-

[1] As set down in *The City of New York*, 147 U.S. 72 and *The Victory* and *The Pleiades*, 168 U.S. 410.

tions can be justified only if upon the closest scrutiny of the navigation of each vessel it can be discovered that one of them was free from all culpable blame."

CONCLUSION

The versions of litigants in collision cases are never the same and seldom reconcilable. Petitioner complains because its version has been rejected by two courts. This does not present a case calling for the supervision of the Supreme Court of the United States. The petition for writ of certiorari should be denied.

Dated: September 21, 1960.

Respectfully submitted,

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In the Supreme Court of the United States

No. 371

Reply to Briefs in Opposition to Petition for Writ of Certiorari

In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 371

OLIVER J. OLSON & Co., a Corporation,
Petitioner,

vs.

LUCKENBACH STEAMSHIP COMPANY, a Corporation,
Respondents.

Reply to Briefs in Opposition to Petition for Writ of Certiorari

Respondents' Reply Briefs miss the import of this Petition for Certiorari. The petition necessarily related the facts; respondents attack that statement and thereby imply that the petition seeks a review of these facts. This is not the case.

Petitioner seeks review of the proceedings in the Court of Appeals because Petitioner was denied its rights to a review of the District Court's decision under the standard pro-

scribed by Rule 52(a) of the Federal Rules of Civil Procedure. The replies of respondents avoid this issue. Respondents merely suggest that the same result might have been reached by the proper standard of review. Perhaps it might and perhaps not. It is pure speculation to say what the Court of Appeals would have concluded about the facts if it had applied the proper standard of review. The basis of Petitioner's position is that it is entitled to have the case re-appraised by the Court of Appeals in the light of the correct standard.

The Court of Appeals announced the principle upon which it acted. It required Petitioner to establish error in the District Court beyond the possibility of dispute. In this it erred.

Respondents dispute certain facts referred to in Petitioner's narrative, but that is not enough. The Court of Appeals either disregarded these facts or refused to give weight to them, solely because they were not established *beyond doubt*. If it had recognized that these facts did not have to be established beyond doubt and, after then weighing them, still found otherwise, there would be a different case.

The Petition stated that the District Court's opinion contained findings which were contradictory and therefore the Court of Appeals should have remanded. Virtually all of the contents of respondents' briefs are directed to this point. To sustain the testimony of the Luckenbach witnesses, respondents argue that the trial court's finding that the Olson was on a 320 degree course and stayed on that course until shortly before the collision is incorrect. This is an admission that the trial court's findings do not support its judgment, and this confirms Petitioner's contention that the courts below misapprehended the effect of the evidence.

and that under the proper application of Rule 52(a) the cause should have been remanded to the District Court.

The evidence relied upon by the District Court constitutes a physical impossibility, and respondents are careful not to claim that it was physically possible.* The error of the Court of Appeals which is the basis of this Petition lies not in finding that it was, or was not, possible; the error is in its complete failure to weigh that evidence against the highly probative evidence to the contrary, and in further stating that the "highly probative evidence" would have to be free of possibility of errors and "beyond dispute" before it could outweigh evidence labelled as credible by the Trial Court.

It is respectfully submitted that the writ should issue.

Dated: September 28, 1960.

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*Luckenbach's brief refers to a chart (Luckenbach Exhibit 21) prepared by its expert showing that the collision could have occurred on "meeting courses". That is not the point. That very chart shows that on the courses there depicted the Olson would be showing to the Leopard only its green light, and not both red and green as required to bring the approach within the mandate of Article 18 of the International Rules for Navigation at Sea.